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In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS W. TIERNEY,
Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO REGARDING PROCEEDINGS NO. 10310 THEREIN

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QUESTIONS PRESENTED

1. WAS PETITIONER DEPRIVED OF DUE PROCESS OF LAW AND ADEQUATE ASSISTANCE OF COUNSEL BY THE TRIAL COURT'S FAILURE TO GRANT HIS REQUESTED CONTINUANCE BEFORE TRIAL?

2. WAS PETITIONER DEPRIVED OF A FAIR DETERMINATION ON APPEAL ON THE QUESTION OF THE TRIAL COURT'S ABUSE OF DISCRETION IN FAILING TO GRANT HIS REQUESTED CONTINUANCE BY EXCLUSION FROM THE RECORD ON APPEAL, AT THE REQUEST OF THE STATE, OF SUBSTANTIAL QUANTITIES OF MATERIAL BEARING UPON HIS RIGHT THERETO WHICH HAD BEEN BROUGHT TO THE ATTENTION OF THE TRIAL COURT, BUT WHICH IT HAD NEGLECTED TO TRANSMIT TO THE CASE FILE?

3. WHAT STANDARD (FROM AMONGST THOSE APPLIED BY THE VARIOUS FEDERAL CIRCUITS OR OTHERWISE) APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT IN GRANTING A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE, PARTICULARLY EVIDENCE OF FALSE TESTIMONY BY PROSECUTION WITNESSES; AND WHERE ADEQUATE PROVISION THEREFORE WAS INVOKED BY PETITIONER UNDER STATE PROCEDURAL RULES, IS HE ENTITLED TO A DETERMINATION ON SUCH QUESTION PRIOR TO A RESORT TO FEDERAL REMEDIES?

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PETITION FOR WRIT OF CERTIORARI

Petitioner THOMAS W. TIERNEY requests the Court to issue a Writ of Certiorari to Review the Opinion of the Court of Appeals of New Mexico, entered April 11, 1989, in Proceedings No. 10310, affirming the Judgment of his convictions by the Second District Judicial Court of Bernalillo County, New Mexico.

OPINION BELOW

The Opinion of the Court of Appeals of the State of New Mexico is reproduced in the Appendix, beginning at page A1.[1]

JURISDICTION

The Opinion of the Court of Appeals of the State of New Mexico sought to be reviewed by Writ of Certiorari is dated April 11, 1989. An Order of said Court denying Petitioner's timely motion for rehearing thereon was denied without comment on May 23, 1989. Thereafter, a petition for writ of certiorari to review said Order was likewise denied without comment by the Supreme Court of New Mexico on June 27, 1989; and Petitioner's motion for rehearing on said petition was similarly denied without comment on July 18, 1989.[2] The Jurisdiction of this Court is invoked pursuant to Rules 17 and 20 of the Supreme Court Rules, and 28 U.S.C. Section 1257.

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1. The Opinion of the Court of Appeals of New Mexico will be cited herein as "Op.", followed by the page number. Proceedings of the New Mexico courts are tape recorded; and are not transcribed for appellate purposes. Except as otherwise noted herein, the rulings of the trial court were oral, and are reflected on the official docket under the dates indicated.

2. A copy of the latter Opinion of the Supreme Court of New Mexico, evidencing the timely filing of this petition, is reproduced in the Appendix, at page A26.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process and Assistance of Counsel clauses of the Fifth and Sixth Amendments to the United States Constitution.

2. The Fourteenth Amendment to the United States Constitution.

3. Article VI, Sections 2 and 3 of the Constitution of the State of New Mexico.

4. Sections 30-16-6, 30-28-2, 30-28-3, 30-42-3A(6) and (16), and 30-42-4(C), NMSA 1978, as amended.

STATEMENT OF THE CASE

The charges herein were initiated by amended indictment returned against Petitioner and others by a New Mexico grand jury.

Each of the charges set forth in the indictment related to the operations of a wholly owned subsidiary of The Midwestern Companies, Inc. ("Midwestern"), of Joplin, Missouri, which had built and sold some 8 ethanol plant facilities in Clovis, New Mexico during 1982 and 1983, some 5 of which (the "IRB plants") were constructed with financing obtained through the issuance of some $7.5 million principal amount of industrial revenue bonds of the City of Clovis (the "IRB's").[3]

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3. A total of 5 persons were named in the indictment. Charged under all counts were: Ronald R. Walker, President, CEO and a director of Midwestern ("Walker"); Carl E. Wright, Secretary and Treasurer of Midwestern and its subsidiaries, a director in each, and senior partner in a Joplin, Missouri accounting firm which served as its accountants ("Wright"); Kenneth D. Sinks, a vice president of the subsidiary in charge

(Continued on following page)

Count I alleged that Walker, Wright, Sinks and Petitioner conspired to commit fraud by the submission of false requisitions to the trustee bank of the construction funds underlying the 5 IRB bond issues (the "trustee"), while knowing that all or a portion of the funds requisitioned would be used for the payment of construction costs of a non-IRB plant.

Counts II, IV and V each alleged that the same co-conspirators misrepresented to the trustee that certain funds obtained by IRB requisition were for the purpose of paying specific construction costs associated with the 5 IRB plants, while knowing that all or a portion of said funds were to be used for other purposes, including construction of an unauthorized plant.

Count VI alleged that Walker, Wright, Sinks, Liscom and Petitioner conspired to commit fraud by misrepresenting to the investors in the 5 IRB plants, and to investors and potential investors in stock of Midwestern and others, that 4 of the IRB plants were completed and operational by December 31, 1982, and that the full sales price of those plants was properly claimed as earnings or profits by Midwestern for the year 1982.[4]

Footnote continued—

of the Clovis construction, and one of its directors ("Sinks"); and Petitioner, outside legal counsel to Midwestern and its subsidiaries, who had likewise served as a director of Midwestern for a ten month period from May 25, 1983 until his resignation in both capacities on March 26, 1984, and whose offices were located in Kansas City, Missouri, some 175 miles removed from those of Midwestern in Joplin. Named in a single conspiracy count of the indictment was a Paul Liscom, a New Mexico engineer engaged by Sinks, who allegedly signed false certificates of inspection relating to four of the ethanol plants in question as at December 29, 1982.

4. The plants were sold by Petitioner's client as tax shelters, but it was undisputed that Petitioner, who was not a

(Continued on following page)

Count VII alleged that Walker, Wright, Sinks and Petitioner criminally solicited Liscom to engage in conduct constituting a third degree felony.

Count VIII was a racketeering count charging Walker, Wright, Sinks, Liscom and Petitioner with the crime of racketeering predicated on 2 or more of the feloneous acts of fraud or criminal solicitation alleged in the indictment.

Petitioner's initial motion for discovery was filed in advance of even the docketing of the court's order setting the time within which pre-trial motions might be filed.

Dissatisfied with the State's lack of cooperation in its discovery efforts, Petitioner served a written, comprehensive and specific multi-page *Brady* request upon the State on December 11, 1986, which is reproduced in part in the Appendix, beginning at page A52. Thereafter, following repeated requests of the prosecution for assistance in obtaining access to discovery material in the hands of federal agencies to which it had access, but to which Petitioner did not, and complaints to the court regarding the State's failure of response, the court requested the defense to submit a proposed order to aid in its discovery efforts; an intial draft of which was forwarded for consideration in January, 1987.

Footnote continued—

tax lawyer, never rendered any tax opinions or advice with respect thereto. In order for the plants to qualify for certain tax deductions and credits in the hands of the buyers thereof, it was necessary that they achieve a status of "available to be placed in service" by December 31, 1982, within the meaning of the Internal Revenue Code and Regulations. For purposes of booking the sales thereof in 1982, it was necessary that they achieve the status of being "substantially complete" by December 31, within the meaning of General Accepted Accounting Principles.

In the meanwhile, contrary to the internally adopted Petite policy of the U.S. Department of Justice, each of Walker, Wright, Sinks and Petitioner were indicted in federal grand jury proceedings in the Western District of Missouri.[5] The federal grand jury which returned said indictment was conducted by an Assistant U.S. Attorney whose husband was a partner in a law firm which was concurrently representing Midwestern's directors' and officers' liability carrier in massive civil litigation, including a civil declaratory judgment action seeking to avoid coverage of Petitioner and other directors in Midwestern under a $35,000,000 policy by reason of a criminal acts exclusion therein.[6]

Both Walker and Wright agreed to plead guilty to both New Mexico and federal charges in a combined federal/state plea bargain arrangement, under which they agreed to testify against Petitioner at trial. Sinks en-

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5. Said indictment alleged that the same acts of Petitioner charged by the New Mexico indictments constituted a conspiracy by him with others to impede the lawful government function of the IRS in the ascertainment, computation, assessment and collection of income taxes in violation of 18 U.S.C. Sec. 371, wilful assistance in the preparation and presentation to the IRS of partnership and individual income tax returns which were false and fraudulent as to material matters in violation of 26 U.S.C. Sec. 7206(2), SEC disclosure violations under 15 U.S.C. Secs. 78j(b) and 78ff, and insider trading violations under 15 U.S.C. Secs. 78j(b) and 78ff, and Rule 10-b5 thereunder.

6. Petitioner sought pre-trial dismissal of the federal indictment as to him by reason of the conduct of the grand jury proceedings by an unauthorized party having a personal and financial conflict of interest in its charging decision in violation of Rule 6(d) of the Federal Rules of Criminal Procedure, 18 U.S.C. Sec. 208(a) and 28 CFR Secs. 45.735-4 and 45.735-5; but such relief was denied, and the same Assistant U.S. Attorney would later serve as lead trial counsel in Petitioner's federal trial, where he was convicted of the tax counts alleged by the indictment but acquitted of each of the securities violations alleged thereby.

tered into the same arrangement following his New Mexico conviction; and Liscom, following his New Mexico conviction, agreed to testify against Petitioner in exchange for federal immunity from prosecution, and received probation under his New Mexico conviction.

With interruptions occasioned by the severed New Mexico trial of Sinks and Liscom during January and February, conversations continued with the prosecution, with and without the enlisted aid of the court, wherein the State maintained its position that it was under no obligation to assist the defense in obtaining information outside of its own open discovery file, insisted that it had not reviewed any materials in the hands of the SEC beyond those contained in such file, and objected to the breadth of Petitioner's proposed discovery orders.[7] Following repeated such conversations, the defense was asked by the court to attempt to narrow the scope of its proposed order to a version which might be more acceptable to the State. This request was complied with on or about March 1, and a somewhat modified version of the final draft of Petitioner's proposed order in aid of discovery was entered by the court on March 12, 1987.[8]

Although the court's order in aid of discovery specifically required that Petitioner be provided access to voluminous materials in the possession of the IRS and the SEC, and was directed to both the State and said agencies, the federal agencies remained entirely uncooperative in responding to defense requests for such access, and the

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7. See letter from the State prosecutor to defense counsel, and copied to the court, as reproduced in part in the Appendix, beginning at page A59.

8. A copy thereof is reproduced in the Appendix, beginning at page A27.

State continued to refuse to aid the defense in gaining such access the court specifically instructed the State to assist the defense in this regard by contacting the agencies involved.

Following the belated expression of intention to cooperate by the federal agencies in late May, the defense made immediate arrangements to examine the SEC materials at its offices in Washington on June 5th and 6th, and the great bulk of its time between the expression of federal agreement to cooperate and those dates, as well as considerable time thereafter, was spent in the examination of IRS records and documents at its offices in Kansas City, Missouri.[9]

Following consideration by long distance telephone conference call of Petitioner's motion for a show cause

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9. The trip to the SEC offices in Washington involved an examination of some 60,000 pages of documents and information over a period of 2 days. Because the SEC would not permit off-premises copying of requested materials, nor make any of their copy machines available for that purpose, it was necessary for the examiners, in the limited time available to them, to simply mark those documents which appeared to have relevancy to the case for copying, and arrange to lease a copy machine and hire an outside operator to come to the SEC during the following week to copy the more than 6,000 pages of documents and materials so marked, and to ship them to defense counsel's offices in Kansas City. Removal and rearrangement by the SEC of the vast number of non-indexed cardboard boxes in which these materials were stored prior to the arrival of the contract copier made it necessary for her to reexamine the entire 60,000 pages of documents in her search for those marked for copying, and extending the period for their copying and shipment by some 3 weeks. In addition, a great number of documents which the defense had desired to copy, including the working papers of Peat, Marwick & Mitchell, Midwestern's outside auditors, relating to their 1982 audit and relevant to these proceedings as reflecting their own independent determination of the status of completion of the plants at year-end 1982, the propriety of the expenditures in relation thereto, and the availability thereof for federal income tax credits and

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order and for a continuance of the July 7, 1987 trial date because of delays encountered in discovery, the trial court, on June 24, agreed to extend the scheduled date by only one week, to July 14, in order to provide the defense additional time for discovery. Defense counsel in the meanwhile, by reason of the unexpected failure of a plea-bargain, had become engaged in the trial of a complex federal criminal case in the United States District Court for the District of Kansas, which was expected to continue until on or after the scheduled date for trial herein, and would thereby be precluded from examining and evaluating any material in depth, even if it were in fact produced prior to trial.

Upon continued failure of discovery on the part of the State, the defense moved for a continuance of the scheduled trial date of sufficient duration to permit it to obtain and review the discovery material covered by the trial court in its order of March 12, so that it might make effective use thereof at trial. The trial court scheduled Petitioner's said motion for hearing in Albuquerque

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Footnote continued—

deductions, were not made available to them during their visit to the SEC. Instead, an SEC representative advised that they would arrange for their copying and shipment to defense counsel shortly after their visit; but in fact, these documents, which encompassed many hundreds of pages, and which counsel had made separate arrangements for examination and analysis by independent accountants prior to trial, were not fully delivered to the defense until trial in these proceedings had actually begun, making such examination and analysis impossible.

Similar problems were also encountered with the IRS, which because of its own policies regarding off-premises copying, would only allow the removal of a few hundred pages of documents per day for copying, under supervision, in Petitioner's offices. The result was that, despite diligent effort on the part of the defense, several weeks were likewise required for copying some 3,500 out of a total of approximately 35,000 pages of IRS materials examined.

on July 6, one week in advance of the scheduled trial date, and because of defense counsel's involvement in federal trial as aforesaid, and the illness of local counsel, the same was of necessity argued by defense counsel's then partner, who lacked familiarity with the case; the result of which was that an additional continuance of only 1 week was granted, to July 21, a date which would prove to be only 4 days following the conclusion of defense counsel's federal trial.[10]

At the date set for trial, defense counsel advised the court of the fact that serious deficiencies still existed in the delivery of discovery materials by the State; and that because literally thousands of pages of the materials which had then been produced had only been received during and subsequent to his conflicting federal trial, he would be deprived of any opportunity to make effective use of them at trial simply because time would not allow for their adequate review by him, or for their separate analysis by independent experts. In addition, adequate representation of his client required an understanding of their complex and voluminous content. On these bases, he renewed his pre-trial motion for a continuance of the trial to allow for completion of discovery and adequate time to review and make effective use of the materials

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10. At the July 6 hearing aforesaid, the defense had introduced some 21 separate exhibits, representing many hundreds of pages of documents and materials received from the IRS and the SEC by that date, which, because of his intervening federal trial, he had not and would not have the opportunity to review or to make effective use of at trial, without a continuance of sufficient duration for that purpose. Because of continued delays being experienced in the receipt of the balance of such information, the number of pages of such material which would continue to be received without the benefit of opportunity for review by the defense prior to trial would subsequently grow from many hundreds of pages to many thousands of pages by the time of trial.

received. Said motion was denied, and trial was ordered to commence.

Walker, Liscom and Larry Skelly, the construction contractor for the 4 plants forming the basis of the Count VI conspiracy, each testified in great detail at Petitioner's trial concerning the details of an alleged late evening telephone call on December 29, 1982, in which Petitioner was alleged to have participated, and during which Liscom was persuaded to alter the language of his inspection certificates with respect to the 4 plants which the company had sold at year-end 1982 in such a manner as to insure his signature thereto, while at the same time concealing the incomplete status of construction thereof at that time. Petitioner has consistently denied having participated in said call, and in providing input into the language of the changed certificates.

Another material and immunized State's witness at trial, Thomas C. Jackson, testified from a single line entry on an isolated page of an aircraft maintenance log, that he had flown Petitioner and Walker to the construction sites in Clovis on 3 separate occasions during the last half of December, 1982, such that Petitioner would have known the status of completion of the plants at year-end 1982 from personal observation; which testimony was corroborated by Walker at trial.[11]

The testimony of Walker, Skelly, Liscom and Jackson was the only direct evidence presented by the State at

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11. Petitioner, for his part, maintained that he had only been to Clovis on 1 occasion during December, 1982, the purpose of which had been to attend a bond closing on behalf of the company, and that the plant sites had not been visited at that time. Walker confirmed that the plant sites had not been visited on the occasion of the bond closing; but maintained that he and Petitioner had been flown to the plant sites on 3 other and separate occasions by Jackson during the latter half of December, as reflected on Jackson's log.

trial of Petitioner's alleged participation in the Count VII criminal solicitation of Liscom (Op., at pp. A18, A19). The only other and indirect evidence on this issue (Op., at p. A19) was the testimony of Carl Baron, a former comptroller of Midwestern, who testified that the false completion certificates had been prepared, and that Petitioner knew of this fact. Baron however, likewise an immunized witness, did not participate in the solicitation of Liscom, and attributed any information which he had regarding the status of completion of the plants as at December 31, 1982, or the signing of the completion certificates, to information which he had received from either Walker or Skelly. Further, Baron testified that he never achieved an understanding of the requirements regarding the extent of completion necessary for "availability to be placed in service" for tax purposes or that of "substantial completion" for the purpose of booking of profits; and consequently, he would have had no basis for making any independent judgment as to whether the completion certificates signed by Liscom were deceptive or not.

Any evidence at trial regarding Petitioner's participation in the Count VI conspiracy, aside from the testimony regarding the alleged telephone conference of December 29, likewise came from either Jackson or Baron (Op., at p. A19), both of whom testified at trial that they had no personal knowledge or understanding whatsoever of the requisite requirements as to the status of completion necessary of accomplishment for either accounting or tax purposes.[12]

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12. Further, the statement of the Court of Appeals (Op., at p. A19) that Baron testified as to Petitioner's knowledge of extensive plans made and implemented by the company to de-

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The same type of infectious credibility permeated the testimony and evidence upon which Petitioner's conviction rests with respect to the Count I, II, IV and V conspiracy and fraud counts. Once again, as noted at Op., p. A18, the only evidence upon which the State relied in this regard was the testimony of Baron, which was derivative of information supplied him by Walker or Skelly.

Petitioner steadfastly maintained throughout trial that he was never informed that any IRB moneys were spent to purchase any materials going into a sixth plant until well after the time at which Midwestern had spent an amount of its own moneys in construction of the IRB plants far in excess of the construction funds available from bond proceeds therefor, and was accordingly entitled to reimbursement from the trustee for construction costs exceeding the construction funds established under the bond issues in any event; and that accordingly, the manner in which it spent those reimbursed funds was immaterial, and certainly not illegal. These excess expenditures of company funds on construction of the IRB plants were confirmed at trial by State's witnesses Walker, Wright and Baron, and denied by no one.

Baron's testimony at trial conflicted with the testimony of Petitioner only with respect to Petitioner's knowledge of the so-called sixth plant or "ghost" plant scheme. Still however, he attributed no evil motive or criminal intent to Petitioner in connection therewith.

Footnote continued—

ceive its auditors so they would approve the booking of revenues from the sale of the plants in 1982, while technically supportable, was in fact, by Baron's own admission, wholly conclusionary on his part, and resulted wholly from inferences which he drew as a result of conversations with or information supplied him by Walker, Jackson or Skelly.

Neither Baron nor anyone else at trial, including the trustee bank's own representative, testified that Petitioner played any part whatsoever in the requisitioning of funds from the trustee bank. In fact, both the bank's representative and former District Attorney Bonem testified that if the bank itself had followed the rigid requisition requirements of the bond indenture, which Petitioner himself had drafted, no expenditure of IRB funds for any component of a non-IRB plant could have possibly occurred.

Although Baron testified that Petitioner at some point in time was made aware by him that amounts aggregating less than $50,000 in IRB funds had been requisitioned from the trustee bank and used to pay for expenditures on some three items of equipment going into a separate plant, he nevertheless steadfastly insisted that Petitioner's knowledge thereof, and failure to take any action with respect thereto, was grounded upon an incorrect legal opinion, rather than any fraudulent intent.[13]

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13. He testified that Walker, and not Petitioner had been the initiator of the idea of building the sixth plant, and that it was only after the comparatively small expenditures mentioned above had been made with IRB funds that he had inquired of Petitioner regarding the legality thereof; and that Petitioner had provided him with a legal opinion, pursuant to that inquiry, that if the comparatively small amount of funds in question had in fact been expended for any component parts going into a separate plant, that a lien would automatically attach to that plant for the benefit of the City of Clovis, and the bondholders would receive the benefit of that lien as additional security for the bonds. That testimony, although conflicting with that of Petitioner (and with that of Walker for that matter, who testified that Petitioner had rejected his idea for the use of IRB funds towards a sixth plant out of hand, and knew nothing of its implementation), could easily have been adopted by Petitioner if he had felt there was any necessity to cover up any of his actions, as it amounts to nothing more than the rendering of an incorrect legal opinion, rather than criminal activity on his part.

As the foregoing demonstrates, and as the Court of Appeals properly noted in its Opinion at the citations provided, the only direct or indirect evidence at trial regarding Petitioner's guilt under any of the counts of the indictment came from either one of the participants in or the observer of the alleged telephone conference of December 29 (Walker, Liscom and Skelly), the pilot who allegedly flew Petitioner and Walker to the plant sites during the latter half of December, 1982 (Jackson), or Carl Baron, whose testimony was based upon information supplied him by one of the other four.

Petitioner's motions for judgment of acquittal at the close of the State's evidence, and again at the close of all the evidence, were denied. Following the verdict, the defense likewise moved for a new trial. The latter motion was heard on oral arguments at the date set for sentencing, October 8, 1987; and was denied by the trial court without review of the documents and evidence received in evidence in support thereof.[14]

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14. Included amongst the some 20 exhibits introduced by the defense at said hearing were various materials discovered by it following trial amongst the belatedly produced SEC and IRS materials and otherwise, including additional flight logs attributable to Jackson's aircraft which exhibited the inability of his plane to make the 3 flights to Clovis in the time shown on the maintenance log from which he testified at trial; Jackson's personal log which listed no flights during the period in question; an IRS cost evaluation conflicting with the value attributed to the plants in IRS testimony at trial; bank and other records evidencing significant misappropriations of company funds by Walker; audit working papers of Peat, Marwick & Mitchell; an internal memorandum of Peat Marwick evidencing lesser standards for booking of profits than were testified to at trial; and the SEC deposition of the partner in charge of Peat Marwick's Office Advisory Group of its Department of Professional Practice Accounting and Audit, evidencing his conclusion on the basis of what was essentially the State's evidence at trial, that no restatement of Midwestern's earnings for 1982, nor any recall of their certification thereof was called for.

Following trial, and during the course of preparation of its appellate brief, the defense filed a motion with the Court of Appeals seeking to supplement the appellate record by inclusion of some 10 separate items of correspondence over the period from December 11, 1986 and June 10, 1987, between Petitioner's counsel and the State, which had been copied to the trial court, and between him and the trial court, which had been copied to the State, evidencing a continuing effort on the part of the defense during this period of time to obtain discovery.[15] On motion of the State, grounded upon the argument that the court's failure to send his copies of this correspondence to the case file had prevented it from becoming a part of the official court record, the Court of Appeals refused its inclusion in the record on appeal.[16]

Likewise during the course of appeal, the defense came into possession of various additional items of newly discovered evidence, which could not have been discovered through the exercise of due diligence prior to trial.

The first series of such items were again located amongst the belatedly produced materials from the SEC and the IRS.[17] These items were significant in and of

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15. Reproduced in part in the Appendix, beginning at page A32.

16. Order of the Court of Appeals dated July 1, 1988, reproduced in part in the Appendix, beginning at page A37.

17. These consisted, amongst other things, of a transcript of a recorded telephone conversation of August 23, 1983 between Liscom and an investigator for the State, wherein Liscom denied ever having met or spoken with Petitioner, and specifically denied having done so on December 29, 1982, the night of his inspection; a notation by State's witness and IRS agent Buchmueller, to the effect that in February, 1984, Liscom told him that he had spoken to Petitioner on the night of his

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themselves, when one considers that their effective use at trial would have required that counsel locate them from amongst some 10,000 pages of instruments and documents made available to him within days of trial, or after trial had already begun, and submit them in many cases to expert analysis as well. Still, even they were not as significant as the second series of documents located during the course of appeal.

This second set of documents came from two sources, i.e., a Midwestern document repository maintained by the law firm in which the husband of Petitioner's federal prosecutor was a partner ("Blackwell Sanders"), and the phone company; and they were to provide incontrovertible evidence that no less than 4 material witnesses had perjured themselves at Petitioner's trial.

The Blackwell Sanders repository consisted of copies of several hundred thousand pages of Midwestern records which had been retrieved by insurance counsel after

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Footnote continued—

inspection, but that he had simply disagreed with the language employed in a suggested certificate of inspection which had been forwarded to New Mexico by Petitioner well in advance thereof, and had used his own wording; further IRS notations to the effect that Walker, on at least 2 occasions, and Sinks on 1, had represented to IRS interviewers (including Buchmueller) that the Clovis plants had, from their own observation, produced alcohol in 1982, which is consistent with similar representations which Petitioner had testified were made to him, and upon which he had relied, and which other defense witnesses had testified were made to and relied upon by them by the same individuals; a copy of a memorandum from IRS District Counsel to the quality review staff overseeing Buchmueller's IRS examination group dated some 14 months prior to trial, advising them that District Counsel did not concur (a prerequisite to assessment) in the assertion of penalties proposed by them on the basis of an overvaluation statement as expressed in the examination reports which they had rendered to the taxpayers and which had formed a basis for their testimony at trial.

they had been shipped to Texas following Midwestern's bankruptcy, and which were stored in the same disheveled order in which they had been found. The court in Petitioner's federal proceeding has determined that Petitioner was "lulled into inaction" with respect to his examination of the materials in the Blackwell Sanders repository by reason of the unlimited access thereto which had been afforded both federal and State prosecutors (see Affidavit at Appendix, p. A50), the absence in the files of both of any exculpatory evidence as to Petitioner drawn therefrom, and the omnibus representation by the federal prosecutor that she had withheld no exculpatory evidence from him.

As a result of his post-trial examination, Petitioner was able to conclusively establish, from travel records, reimbursement receipts and other materials located in the repository, that Jackson did not fly Petitioner and Walker to the Clovis plant sites during the month of December, 1982, as he had testified at trial. In point of fact, Jackson was shown to have been in various other locations throughout the country during the entire period he testified that these visits occurred.[18] Similar records regarding the whereabouts of Walker during this period disclosed that he would have not been available, by reason of his exhibited presence elewhere, on even a single day during this period in order to make the flights testified to by Jackson and confirmed by him in his testimony.

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18. Further, a tracing of the actual nautical miles between his various points of travel during this period, as supplied by the FAA, compared to the actual number of flying hours accumulated on his airplane, as determined from independent readings of the hourly flight recorder thereon by an aircraft maintenance company to which it had been delivered for serv-

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Trial testimony concerning the alleged participation by Petitioner in the telephone conference call with the inspecting engineer Liscom was likewise conclusively established to have been false through examination of the Blackwell Sanders repository.[19]

Despite repeated written and specific *Brady* requests well in advance of trial, as well as the court's order in aid of discovery of March 12, 1987, only the telephone company records of the originating telephone, the Kruzie home in Clovis, were ever produced by the State,[20] which had advised Petitioner that it had discovered on inquiry of the telephone company that neither the home nor office telephone records of Walker were any longer available.[21]

Footnote continued—

ice on both the day preceding and the day following such period, disclosed that he would have been unable to interrupt his travels at any point during this period for the purpose of making even 1 of the Clovis flights he testified to having made at trial.

19. Each of Walker, Skelly and Liscom had testified at trial that the call in question originated from the home of a Larry Kruzie, in Clovis, New Mexico, immediately following Liscom's inspection of the plants on the evening of December 29, and was originally directed to Walker in Joplin, Missouri, who then allegedly conferenced Petitioner into the conversation. Although there was some confusion in Walker's mind as to whether he received the originating call at his home or office, he testified that immediately upon receiving the call he conferenced Petitioner in by calling him on another line while the calling parties from Clovis waited; stating that he had conferencing features by which he could establish such a hook up on both his home and office telephones.

20. See the State's response of December 30, 1986 to Petitioner's discovery request in this regard, which is reproduced in part in the Appendix, at page A61.

21. Reference to the Kruzie records did however disclose that although 4 separate telephone calls were made from the Kruzie telephone to Walker's home numbers in Joplin during the

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Petitioner's review of the repository would prove this assertion on the part of the State to have been false. Located no more than a few feet from the Kruzie records which the State had earlier produced were the telephone company records for each of Walker's home telephones.[22] No call whatsoever was shown thereon to have been made from either of Walker's home telephones to either the home or office numbers of Petitioner, thereby furnishing independent documentary proof that Petitioner had not in fact participated in any way in the conversation which occurred between Walker and the inspecting engineer during which the latter was persuaded to alter and sign his inspection certificates.

Because of the obvious misrepresentation by the State concerning the availability of Walker's home telephone records, Petitioner determined to test the truth of their pre-trial assertion that his office records were no longer available as well. He accordingly caused a subpoena duces tecum to be issued to the telephone company in the federal proceedings; and the return thereon

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Footnote continued—

period of time that Liscom was in Clovis on his inspection trip, none had been placed to his office number; thereby establishing that if Walker had conferenced Petitioner in on the conversation with the inspecting engineer as he had testified at trial, it would have had to have been on one of Walker's home numbers.

22. The Kruzie records which the State had earlier produced bore the same identifying Bates stamp numbers as were found on the same records in the repository, filed amongst accounts payable vouchers under the initial "M" for "Mountain Bell"; and located in the same file, under the initial "W" for "Walker", was a similar voucher evidencing reimbursement by the company of that portion of his December-January home phone bill relating to business calls, which had attached thereto a complete and itemized telephone company listing of every long distance call made from each of his home numbers on the evening of December 29.

evidenced that the office records were likewise available. These records similarly evidenced that Walker had not placed any calls to Petitioner from his office during the Liscom inspection tour; and that no such calls had been placed by him from his home or any other location and charged to his office.

The newly discovered evidence referred to above has been called to the attention of both the federal and State courts by way of filing of new trial motions in the trial courts of each sovereign.[23] Unlike the federal courts, the Court of Appeals of New Mexico has twice refused a limited remand to the trial court for ruling on Petitioner's motions. Following denial of Petitioner's petition for a writ of certiorari by the Supreme Court of New Mexico, Petitioner has filed a further petition with said court for a writ of superintending control, as authorized by Art. VI, Sec. 3 of the Constitution of the State of New Mexico, requesting that it direct the Court of Appeals to vacate and withdraw the opinion appealed from hereby, and remand said proceedings to the trial court for consideration of Petitioner's motion for new trial on the basis of later discovered evidence of perjury therein. Said petition will not be acted upon by the Supreme Court of New Mexico in advance of the last date for filing of this petition; but in the event that a ruling thereon in Petitioner's favor is rendered during the pendency hereof, this petition will be withdrawn.

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23. A stay of the appeal was requested in the federal proceedings pending a determination as to whether the District Court was inclined to rule favorably on the federal motion; but the Eighth Circuit, recognizing the serious implications which the newly discovered material held for the validity of Petitioner's conviction, dismissed his appeal without prejudice on its own motion, and returned the case to the trial court with instructions to rule on Petitioner's motion.

REASONS FOR GRANTING THE WRIT

1. The Continuance Issues. Petitioner had every reason to expect, under the provisions of *Brady v. Maryland,* 373 U.S. 83 (1963), *United States v. Agurs,* 427 U.S. 97 (1976), *Giglio v. United States,* 405 U.S. 150 (1972), and *United States v. Bagley,* 473 U.S. 667 (1985), that his comprehensive and specific discovery request of December 11, 1986 (Appendix, p. A52), tendered more than 7 months before trial, would be complied with in sufficient time for him to make effective use of the materials produced thereby at trial.

Under the same authority, he had every right to expect that the trial court's comprehensive order in aid of discovery of March 12, 1987 (Appendix, p. A27), entered some 4 months before trial, and self executing in the sense that it was directed specifically to the State as well as the federal agencies involved, would receive like attention by the State.

Under *Giglio,* supra, *Chaney v. Brown,* 730 F.2d 1334 (10th Cir. 1984), *Martinez v. Wainwright,* 621 F.2d 184 (5th Cir. 1980), and *United States v. Turner,* 490 F.Supp. 583 (D.C. Mich. 1979), the fact that the prosecution may not have even had personal knowledge of the evidence requested is not decisive if it was within the possession of any other governmental agency with whom the prosecution had been cooperating, or to which it had access; and the conclusion by the Court of Appeals (Op., p. A9) that no authority exists concerning the precise factual situation in the instant case, wherein the defense requested that a state agency produce documents in the possession, custody and control of a federal agency, is clearly erroneous in view of *Chaney,* supra.

Under the decisions noted, the State was under an affirmative obligation, from the date of receipt of Petitioner's discovery request of December 12, 1986 to obtain, or assist Petitioner in obtaining, the wealth of material evidence in the hands of the SEC and the IRS, to which he could not otherwise gain personal access. It was not at liberty to sit back and remonstrate, as it did both prior and subsequent to the court's March 12 order in aid of discovery, that it was under no obligation to assist Petitioner in obtaining access to any materials not contained in its own open discovery file, until the court finally acceded to Petitioner's request that it require that it render such assistance a little more than a month before trial, and under circumstances which would make it impossible for defense counsel to review and make effective use of such materials at trial.

In point of fact, the State deceptively misrepresented itself to the Court during all this period of time;[24] and

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24. Compare for instance, the language of the State prosecutor's letter to defense counsel of December 19, 1986 (Appendix, p. A59), which was copied to the Court, and wherein he indicates that the State has examined only those SEC materials which are in its open discovery file, as well as the prosecutor's affidavit which was attached as an exhibit to Petitioner's request for remand (Appendix, p. A46), with the affidavit of the SEC attorney in charge of its Midwestern investigation (Appendix, p. A48). The prosecutor's affidavit would lead one to believe that he had only requested materials from the SEC on the basis of name and subject matter, and had examined only what they sent and nothing more; whereas the SEC affidavit confirms that the State made its own independent evaluation of the SEC materials, and removed only what they chose. Similarly, although the prosecutor would leave the trial judge with the impression that he and Petitioner were operating on a parity insofar as review and access to SEC materials, the SEC affidavit makes it clear that the State was granted open access to the Commission's

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Petitioner submits that such deception, as well as the State's ability to effectively hide the strenuous and continuing efforts on the part of the defense to obtain discovery of materials to which it was entitled by successfully persuading the Court of Appeals to exclude some 31 pages of documentary evidence thereof from consideration on appeal on the theory that it does not fall within a strained interpretation of the definition of materials qualifying as a part of the record proper under SCRA 1986, 12-209(A) because the trial court had neglected to send his copy thereof to the case file, deprived him of a fair consideration on appeal of the question of whether the trial court abused its discretion in failing to grant his requested continuance.[25]

Discovery, if justice is to be served, must require that production contemplate more than simple disclosure at or during trial in complex cases such as this, where literally hundreds of thousands of pages of documents require examination, and oftentimes evaluation by independent experts. A defendant's constitutional right to

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Footnote continued—

non-public investigative files more than two and one-half years prior to trial, and had made continuing use thereof from time to time throughout that period.

These deceptions on the part of the prosecution no doubt contributed significantly to the trial court's summary denial of Petitioner's requests for a continuance of the trial date on July 6, and of his motion for a new trial on October 8, 1987, with the terse comment that any delays in discovery would appear to have been the fault of Petitioner and his counsel.

25. Where one is otherwise entitled to appellate review under a state constitutional provision, he cannot be deprived of that right by any act or restriction of the court. *United States v. Adams*, 6 Wallace (73 U.S.) 101 (1867). The Court of Appeals' refusal to supplement the record on appeal as requested by Petitioner was such a restriction.

a speedy trial should never be turned on its head to deprive him of a fair trial; but such a result will oftentimes occur where the obligation of production is regarded as something less than production *in time for effective use*. When such circumstances occur, and the belatedly disclosed information is material, prejudice to the defendant will always result.[26]

While each case will of necessity turn on its own merits, certiorari should lie not only to cure the deficiencies in these proceedings, but for purposes of imposing a uniform *effective use* standard to be employed by the courts in the exercise of their discretion regarding

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26. For example, the Court of Appeals' conclusion (Op., at p. A5), that the defendant had numerous records at trial similar to those which had not been made available to him by discovery was in error. In the particular instance referred to, the only record which Petitioner had at trial was a single workpaper from Midwestern's 1982 audit, which was amongst hundreds of similar accounting documents which were not furnished him until after trial had actually begun, and which indicated that photocopies of field purchase orders which were being introduced by the State as evidence of wrongful purchasees, did not match, by number, material description or amount, the final purchase orders which had been checked by the company's auditors against vendor's invoices received pursuant thereto and disbursement checks written in payment thereof. The trial court denied best evidence objections by the defense to the admission of the purchase orders tendered by the State because the particular member of the audit team who had prepared the workpaper was not present to testify regarding its preparation and conclusions. The inability of the defense, in the face of the burdensome requirements of interstate subpoena, to produce and examine witnesses with regard to complex materials furnished them only after trial had actually begun, is only illustrative of the types of problems which are encountered by reason of such delayed and delinquent discovery. It is difficult to estimate the full extent to which Petitioner's defense was prejudiced by the failure of the SEC to tender the hundreds of pages of such workpapers when requested on June 4, so as to permit of their analysis of independent experts, rather than mailing them to defense counsel in Albuquerque after trial had commenced.

the grant of continuances on the basis of belatedly produced material evidence, particularly evidence of a technical character.

2. Issues regarding the grant of a new trial on the basis of newly discovered evidence, including evidence of false testimony by prosecution witnesses; and as to whether a defendant's Fifth Amendment rights should assure to him the availability of a determination on such issues under existing State remedies prior to a resort to available federal remedies. The Fifth Amendment to the United States Constitution assures that no defendant shall be deprived of life, liberty, or property without due process of law. Still, this Court has many times held that considerations of comity and the orderly administration of justice require that a defendant exhaust all State remedies available to him before resort to its jurisdiction. The landmark decision in *Mooney v. Holohan*, 294 U.S. 87 (1934), known principally for its determination that a conviction obtained through the knowing use of perjured testimony is in violation of due process of law, provides an outstanding yet torturous example of what this can mean to a convicted and imprisoned felon. But what of a defendant, at liberty on bail, who unlike Mooney has not repeatedly chosen the wrong State remedy, but has been refused an available but discretionary remedy by the State? Is he to be refused certiorari by this Court as a premature remedy, so that he may run the risk of being once again refused relief by a trial court which has previously denied it to him; and permitted only to pursue his lawful appellate remedies from behind prison's gate? Or rather, should certiorari lie in order to require the State to afford him

the full extent of his appealable remedies before the threat of incarceration?[27]

Prior holdings of the New Mexico Supreme Court, as in *State v. Fuentes*, 60 N.M. 52, 342 P.2d 1080 (1959), would seem to indicate that the proper method of addressing a meritorious motion for new trial while a case is on appeal, is by remand to the trial court for consideration. This would seem to track the preferred procedure in the federal courts as well.[28] Such an orderly approach insures that all meritorious claims will be addressed first by the trial court, and then by the appellate court, without the necessity of multiple appeals, and without the possibility of incarceration of a bailable defendant prior to a consideration of each of his appealable claims; and Petitioner is without an answer as to why this procedure has been abandoned in this case.

The newly discovered evidence, other than perjury, which Petitioner has located since trial from amongst the belatedly produced materials from the SEC and the IRS, and as outlined in the Statement of the Case, supra,

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27. Petitioner has been twice refused a limited remand to the trial court for consideration of his motion for new trial; once by order of the Court of Appeals dated January 5, 1989 (reproduced in the Appendix, at p. A38), and a second time by inaction of the Court of Appeals on a second motion for remand during the pendency of his motion for rehearing. In default of favorable action on his presently pending petition for writ of superintending control before the New Mexico Supreme Court, his remedy, if certiorari were to be denied by this Court as premature, would be to then pursue his motion for new trial before the trial court; and although a defendant has a qualified right to bail during the pendency of a motion for new trial under New Mexico law, no such assurance is available to him during an appeal of the trial court's decision if it should decide against him.

28. See *United States v. Boberg*, 565 F.2d 1059 (8th Cir. 1977); *United States v. Phillips*, 558 F.2d 363 (6th Cir. 1977); and *United States v. Ellison*, 557 F.2d 128 (7th Cir. 1977).

is clearly sufficient, in and of itself to warrant a new trial on the basis of the traditional 5 pronged test applied for that purpose by the federal courts, as exemplified by *Edwards v. United States,* 361 F.2d 732 (8th Cir. 1966), and generally expressed as a six-prong test to the same effect in New Mexico decisions; or more appropriately perhaps under the less retrictive requirements expressed in *United States v. Agurs,* supra, since they were located from sources to which the State had continuing open access rather than from a neutral source. Presumably, if this were not the case, the Eighth Circuit would doubtless not have taken it upon themselves to dismiss Petitioner's appeal without prejudice, and direct that the District Court rule upon his motion.

Irrespective of these considerations however, the more recently discovered and incontrovertible evidence of perjury by no less than 4 material witnesses at defendant's trial adds a whole new dimension to the matter.

Later discovered evidence of perjury by a material witness or witnesses at trial is an independent basis for the granting of a new trial under New Mexico law. *State v. Betsellie,* 82 N.M. 782, 487 P.2d 484, 487 (1971); *State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129, 1137 (Ct. App. 1982).

By contrast, the federal courts have determined that the question of whether or not a new trial is to be granted is to turn upon a variation of the five-pronged federal test required for the granting of a new trial on the basis of newly discovered evidence generally.

Where the innocent use of perjured testimony by the prosecution in federal criminal cases occurs, the fed-

eral courts have ruled that the determination of whether the same amounts to a deprivation of due process requiring a new trial is to be made by the application of one of two tests on which the Circuits are divided. See annotation at 59 ALR Fed. 657.

The first such test, adopted by a majority of the Circuits, is known as the "Larrison" test, and initially grew out of the decision in *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). It requires simply a showing that there is "any reasonable likelihood" that "false testimony could have affected the judgment of the jury."[29]

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29. It should be noted that the Federal District Court considering Petitioner's parallel motion for new trial in his federal proceedings, after having described the testimony of these witnesses as "the most damaging evidence against defendant", characterizing it as "the most critical element in the Government's proof" that Petitioner had participated in any way in the manipulation of plant completion records, thereby contributing to the filing of false tax returns, and determining that the New Mexico jury, as well as its own almost necessarily must have accepted it in order to convict, has nevertheless determined that it need not apply the Larrison standard adopted by the Eighth Circuit to its proceedings because it has not yet been reasonably satisfied that perjury was committed. It based this finding upon the concept that "one must accept the frequency of phantasizing [sic] as a phenomenon when witnesses are groping to recall past events", and its resulting conclusion that 4 separate witnesses might have fantasized Petitioner's involvement in the December 29 conference call in their attempt to recollect what actually occurred; whereas they might have received input from him regarding the changed certificates at an earlier time, either directly or through Walker. This conclusion ignores their unanimous testimony in both proceedings that there was never any perceived need by anyone for any consultation whatsoever regarding Liscom's certificate until after his inspection; and that it was revised and signed that evening in Clovis before he ever left town. There was no evidence whatsoever in the federal proceedings upon which to base such a conclusion; and whether it would stand up to further scrutiny therein remains to be seen.

One thing is certain however; and that is that no such conjecture can be engaged in with respect to these proceedings.

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The second such test, adopted by a lesser number of Circuits, is known as the "Berry" test, having originated in the case of *Berry v. State*, 10 Ga. 511 (1851). Under the *Berry* standard, a new trial is required where newly discovered evidence of false testimony would "probably" change the result of the original trial. Under either test, the federal courts have taken the position that the trial court should consider the effect on the trial result if the jury had the opportunity to appraise the impact of the false testimony not only on the factual elements of the government's case but also upon the credibility of the government's witnesses.[30]

Clearly, whether one adopts the New Mexico standard enunciated in *Betsellie* and *Casteneda*, supra, that later discovered evidence of perjury by a material witness or witnesses is an independent basis for the grant of a new trial, or relies on either the *Larrison* or *Berry* standards adopted by the federal courts, a new trial is

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Footnote continued—

Each of the participants who testified concerning the telephone conference call herein were subjected to rigorous and lengthy cross-examination regarding their recollections thereof and of Petitioner's participation therein, and were reminded over and over that they had given different versions thereof on different occasions; yet they each steadfastly insisted upon the accuracy of their trial testimony. In addition, they had each given identical testimony before the same trial court in the severed trials of Sinks and Liscom in New Mexico. Accordingly, there is no room for any conclusion in these proceedings that they were "phantasizing" [sic] rather than engaging in an outright falsehood concerning Petitioner's participation.

30. See *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1975) and *United States v. Krasny*, 607 F.2d 840 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1979) as to those Circuits adopting the *Berry* standard; and *United States v. Meyers*, 484 F.2d 113 (3d Cir. 1973) as to those Circuits adopting the Larrison standard.

obviously warranted in these proceedings. The demonstrated false testimony of each of State's witnesses Walker, Liscom, Skelly and Jackson, together with the obvious effect which it had on their own overall credibility, as well as the credibility of each of the State's witnesses who relied upon them, clearly repudiates the validity of every shred of evidence recognized by the Court of Appeals in its opinion as supporting Petitioner's guilt under any of the counts of the indictment.

Certiorari should lie not only to require that the Court of Appeals remand Petitioner's case to the trial court for consideration of his motion for new trial on the basis of later discovered evidence of false testimony on the part of prosecution witnesses in these proceedings in a manner which will insure his freedom until such matter has been considered by both trial and appellate courts; but to resolve as well the conflict amongst the federal Circuits over the standard to be applied in granting or refusing a new trial on the basis of later discovered evidence of false testimony, and at the same time to establish a common standard applicable to the States in such cases through the Fourteenth Amendment.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Filed April 11, 1989)

IN THE COURT OF APPEALS
OF THE STATE OF
NEW MEXICO

No. 10,310

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

THOMAS W. TIERNEY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF
BERNALILLO COUNTY
STANLEY F. FROST, District Judge

HAL STRATTON, Attorney General
DANIEL J. PEARLMAN, Ass't Attorney General
Santa Fe, New Mexico
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Attorneys for Defendant-Appellant

MEMORANDUM OPINION

DONNELLY, Judge.

Defendant Thomas Tierney appeals his conviction on two counts of conspiracy to commit fraud, three counts of fraud, one count of criminal solicitation, and one count of racketeering. Defendant raises eight claims on appeal: (1) the trial court erred in denying his motion to dismiss for preindictment delay; (2) claim of prejudice resulting from the state's failure to comply with discovery; (3) failure to grant continuances of sufficient time to permit him to adequately prepare for trial; (4) that the trial court erred in admitting testimony based on facts not in evidence; (5) that the prosecution knowingly used false evidence; (6) claim of cumulative error; (7) claim of insufficient evidence to support his convictions on each count; and (8) that the charge of criminal solicitation merged in the charge of criminal conspiracy. In addition, while the appeal was pending, the parties filed motions that were taken under advisement pending submission to a panel. Other issues listed in defendant's docketing statement but not briefed are deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct. App. 1985). We affirm.

Defendant, a lawyer, was indicted together with four other co-defendants on criminal charges arising out of the operations of Midwestern Companies, Inc. (Midwestern), and Titan Energy Engineering, Inc., (Titan), a New Mexico corporation and subsidiary of Midwestern.

Other indicted co-defendants were Ronald R. Walker, president of Midwestern and a vice-president of Titan; Carl E. Wright, secretary and treasurer of Midwestern

and Titan; Kenneth D. Sinks, a vice-president of Titan. Defendant Paul Liscom was an independent engineer hired by Midwestern to attest to the fact that the plants were substantially complete on December 31, 1982. Defendant Tierney was retained as counsel for both Midwestern and Titan.

The charges against defendant arose out of the activities of Midwestern and Titan in constructing several ethanol plants near Clovis, the subsequent sale of the plants, and defendant's alleged improper acts toward general and limited partners and other investors in the plants. Midwestern undertook to construct five ethanol plants with funds from the sale of Industrial Revenue Bonds issued by the City of Clovis. At the time the plants were commenced, the federal government authorized tax incentives to encourage the building of such plants. The revenue bonds were sold and the proceeds placed in the hands of a trustee who was to repay plant construction costs as the costs were incurred.

The criminal charges against the defendants, including Tierney, related factually to two areas of activity. First, the state alleged and proved at trial that defendants used some of the funds authorized for the five plants to construct a sixth, unauthorized plant, referred to sometimes as the ghost plant. Second, the state alleged and proved at trial that defendants represented four of the five authorized plants as substantially complete as of December 31, 1983. These representations were made both to the investors who purchased the plants and to Midwestern's independent auditor, Peat, Marwick & Mitchell. The representations to Peat, Marwick & Mitchell were important in securing the auditor's approval of the booking of the proceeds of the sales in

1982, which in turn was important in increasing the value of Midwestern's stock.

On motion of the defendant, his trial was severed from that of the co-defendants.

I. PREINDICTMENT DELAY

The charges against defendant arose out of actions of defendant which were alleged to have occurred between the dates of August 1, 1982, and May 1984. Defendant was indicted on May 26, 1986.

Defendant claims he was denied due process as a result of preindictment delay. In support of this contention defendant asserts that he was prejudiced in that evidence which would have established his innocence was lost as a result of the delay. He points specifically to the loss of telephone records of Ron Walker, a co-defendant who testified against defendant at trial; the loss of certain construction records relating to ethanol plants I through IV which had been given to the district attorney; and the loss of payment records for purchase orders and cancelled checks which defendant contends evidenced payment of certain items by Midwestern.

In reviewing claims of alleged prejudice resulting from preindictment delay, this court is required to conduct an independent review. *State v. Grissom*, 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987). To obtain dismissal on the basis of preindictment delay, the defendant must first show actual prejudice from the delay. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978); *State v. Grissom; State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976). Our review of the record indicates that defendant has failed to establish actual prejudice by the

claimed loss of items detailed by defendant. Defendant is required to establish that he suffered actual prejudice from any delay in his arrest and prosecution; mere assertions of counsel of alleged prejudice do not constitute evidence. *State v. Lewis,* 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988).

(A) Defendant claims Ronald Walker's telephone records were lost because of the delay and that the records would have supported his claim that he did not participate in a December 29, 1982, telephone call with Walker and Paul Liscom during which Liscom was persuaded to sign certificates of inspection falsely indicating that the ethanol plants constructed by Midwestern and Titan had been completed. It appears from the argument that by the time defendant was indicted or sought to obtain the records, neither Walker nor the telephone company had copies of the records. Defendant argued at trial that the state could not prove he participated in a telephone call with Walker and Liscom because the state did not have the records in its possession. The evidence at trial was conflicting on this issue. Defendant denied that he had participated in the call. Co-defendant Walker testified that defendant was on the line during at least a portion of the time the call was made. Liscom also testified at trial that defendant participated in the phone call.

A fifth amendment due process violation asserting pretrial delay requires proof of intentional delay on the part of the prosecution in bringing the charges in order to gain a tactical advantage or to harass the defendant and a showing of actual prejudice. *United States v. Marion,* 404 U.S. 307 (1971). Defendant has failed to establish either actual prejudice or any intentional delay

by the state or that the state delayed in obtaining the indictment for purposes of harassment. We find no merit in defendant's argument on this issue.

(B) Defendant also claims he was prejudiced in defending the charges against him because certain construction records were no longer available and that he needed payment copies of purchase orders and cancelled checks relating to payment. Defendant does not contend that the state had these records in its possession or that the delay was intentional. Moreover, defendant had numerous similar records at trial. Defendant concedes that any discrepancy between the copies used in evidence and the company records was brought out at trial by his attorney through the use of working papers from a 1982 audit. Thus the loss of these records did not foreclose defendant from asserting this issue and defendant failed to establish that he was prejudiced by reason of his failure to obtain the records, or that the state acted in bad faith in failing to obtain or preserve such evidence. *See Arizona v. Youngblood*, ... U.S. ....., 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Defendant further contends that records which he previously delivered to the state were needed by him at trial and would show that Midwestern and Titan spent substantial amounts of their own funds on the ethanol plants in question. The state conceded at trial that the corporations spent substantial amounts of their own funds on these plants. Hence, this contention was not contested at trial. Moreover, evidence that the corporations spent their own money incident to construction of the plants is not a defense to fraud or conspiracy. The crime of fraud occurs when the taking or misappropriation occurs; it is irrelevant that no actual loss was sus-

tained. *See State v. McCall,* 101 N.M. 32, 677 P.2d 1068 (1984). Similarly, conspiracy consists of knowingly combining with another for purpose of committing a felony. NMSA 1978, § 30-28-2 (Repl. Pamp. 1984). *See also State v. Chavez,* 99 N.M. 609, 661 P.2d 887 (1983). Conspiracy does not require proof of an overt act in connection with the conspiracy since the offense is complete when the prohibited agreement is reached. *State v. Davis,* 92 N.M. 341, 587 P.2d 1352 (Ct. App. 1978). Based on our review of the record, we affirm the trial court's determination that defendant has failed to establish that he was actually prejudiced by the unavailability of both the telephone and construction records. *Cf. State v. Grissom.*

II. ISSUES OF DISCOVERY AND CONTINUANCES.

We jointly discuss defendant's issues concerning discovery and denial of his request for continuances.

Defendant claims he was denied due process by the trial court's failure to enforce discovery orders and to grant him continuances of sufficient duration to allow his counsel to review materials requested by him from the Internal Revenue Service (IRS) and the Securities Exchange Commission (SEC).

The trial court held an evidentiary hearing on these issues on July 6, 1987, and found as fact that any delays in discovery of these records were caused by the acts and omisions of defendant and his counsel. The trial court's finding is supported by the record. The trial court found that defendant's efforts at discovery were directed at forcing the attorney general's office to provide these materials; that defendant did not attempt to

subpoena the requested records from other agencies or individuals; and that after obtaining an order from the trial court in aid of discovery, defense counsel waited over a month to send a copy of the order to the IRS and the SEC and did not vigorously pursue arrangements to review the records in question until late May 1987. An appellate court will sustain findings of the trial court if they are supported by substantial evidence. *Padilla v. Lawrence,* 101 N.M. 556, 685 P.2d 964 (Ct. App. 1984).

Defendant asserts that the trial court erred in denying his requests for continuances. Requests for a continuance are addressed to the sound discretion of the trial court. A trial court's decision as to the granting or denial of a continuance will not be disturbed absent a showing of an abuse of discretion. *State v. Tovar,* 98 N.M. 655, 651 P.2d 1299 (1982); *State v. Perez,* 95 N.M. 262, 620 P.2d 1287 (1980). Where a defendant has not demonstrated that he has been diligent in his efforts to obtain records or discovery, the trial court may properly deny the continuance. *State v. Pruett,* 100 N.M. 686, 675 P.2d 418 (1984).

The trial court determined that the state had complied with its discovery orders. Defendant argues on appeal, however, that under *Brady v. Maryland,* 373 U.S. 83 (1963), the state is required to make available to him all the materials in the files of both federal agencies because the state and the federal agencies had cooperated with each other. Defendant asserts the state's failure to supply these materials requires reversal. We do not agree. In *State v. Fero,* 107 N.M. 369, 758 P.2d 783 (1988), the supreme court reaffirmed a three-part test to determine whether deprivation or loss of evidence

to defendant constitutes reversible error. "The test requires proof that: (1) The State either breached some duty or intentionally deprived the defendant of evidence; (2) the improperly suppressed evidence must have been material; and (3) the suppression of this evidence prejudiced the defendant." *Id.* at 370, 758 P.2d at 784.

Defendant cites a number of cases he asserts stand for the proposition that when two law enforcement agencies are cooperating, one can be forced to produce the materials in the possession of the other. *E.g., Giglio v. United States,* 405 U.S. 150 (1972); *Martinez v. Wainwright,* 621 F.2d 184 (5th Cir. 1980); *United States v. Deutsch,* 475 F.2d 55 (5th Cir. 1973), *overruled by United States v. Henry,* 749 F.2d 203 (5th Cir. 1984). None of these cases, however, specifically dealt with the precise factual situation in the instant case wherein defendant requested that a state agency produce documents in the possession, custody, and control of a federal agency. *Cf. State v. Bustamante,* 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978) (not error to refuse to require state to produce a report which is not within possession, custody, or control of state). Defendant concedes that these materials were all in the possession of his attorney during trial but contends that they could not be used because they were received too late for his attorney to effectively review them. Defendant cites no authority for the proposition that under those circumstances, a breach of prosecutorial duty can be found or that he has been prejudicially deprived of the use of the evidence. Significantly, defendant has failed to specifically establish that the materials complained of were material to his defense. *See State v. Boeglin,* 105 N.M. 247, 731 P.2d 943 (1987) (where evidence is not material, court need

not resolve claims of prejudice). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Fero,* 107 N.M. at 371, 758 P.2d at 785 (quoting *United States v. Bagley,* 473 U.S. 667, 682 (1985)). The determination that evidence is material is made by evaluating the evidence in the context of the entire trial. *State v. Johnson,* 99 N.M. 682, 662 P.2d 1349 (1983); *State v. Gilbert,* 100 N.M. 392, 671 P.2d 640 (1983), *cert. denied,* 465 U.S. 1073 (1984).

Defendant argues that the maintenance logs of the company aircraft and the personal pilot's logs of Tom Jackson were material because they could cast doubt on Jackson's testimony that defendant was in Clovis three different times during the last two weeks of 1982. Defendant admits that he was in Clovis at least once during that period of time but denies that he visited the ethanol plants. The record contains trial testimony and evidence indicating that even if defendant did not visit the plants during this time, he nevertheless was aware of the fact that the plants were not completed.

Defendant contends that he was deprived of a memorandum from an accounting firm, Peat, Marwick and Mitchell, that had conducted audits of Midwestern. Defendant asserts the memorandum indicated that it was not necessary to have the plants operated by an independent company after they were sold. Defendant's brief does not explain the materiality of this evidence or cite to the record indicating where this issue was preserved at trial or the motion for new trial. *See* SCRA 1986, 12-213(A)(3); *see also State v. Turner,* 81 N.M. 571, 469

P.2d 720 (Ct. App. 1970) (there must be a particularized need for the materials not produced). We find no error in the trial court's ruling on this issue.

Defendant next argues that he was deprived prior to trial of the deposition of Henry A. Quinn and that this evidence was material. Defendant's brief omits any reference to how this issue was preserved below. Quinn's deposition indicated that in 1984, after questions began to arise concerning the plants, Peat, Marwick and Mitchell decided that it did not have to change its 1982 audit of Midwestern. Again, defendant's brief does not explain how this information was material or how it would have changed the outcome of the trial. Defendant has failed to establish any error as to this contention.

Similarly, defendant argues that the deposition of Donald G. Brewer, Richard McCall, "and others" were belatedly furnished by the prosecution and that these disclosed that Ronald Walker had made unreported sales of Midwestern Securities and that Walker allegedly misappropriated $325,000 of company funds. Defendant contends this would have been valuable for cross-examination of Walker and would have permitted impeachment of Walker's testimony. At trial evidence was elicited showing that Walker was a convicted felon and was awaiting sentence for criminal offenses growing out of his activities with these same plants. It is also undisputed that Walker had given different versions of the events at issue in this trial to different entities and individuals. In light of the fact that Walker's prior convictions and his conflicting testimony were elicited at trial, defendant has failed to establish prejudice concerning this evidence. Moreover, the trial court found at the hearing on defendant's motion for new trial that

there was no reasonable probability that the evidence sought by defendant would have changed the result at trial. Our review of the record supports the ruling of the trial court. *See United States v. Bagley,* 473 U.S. 667 (1985).

Defendant asserts that he was also denied access to copies of handwritten notes of Carl Wright taken at various meetings of board of directors and loan receipts, wire transfers, deposit slips, and banking records of Midwestern and Walker which were within the possession of the SEC. Defendant argues these would have permitted impeachment of Walker; however, his brief does not indicate where this issue was preserved below. *See* R. 12-213(A)(3). Alternatively, the trial court's denial of defendant's motion for new trial on this issue was not error. Defendant has failed to establish a reasonable probability that the proceedings would have been different if he had had the documents in issue.

Defendant further contends that he was deprived of certain tax returns as evidence at trial and contends this evidence was material because it would have demonstrated that the federal government would not lose as much money from tax benefits claimed by purchasers of the ethanol plants as prosecution witnesses indicated. Defendant concedes that at the time of trial, he had fifty-eight of the ninety tax returns and did not use any of them for the purposes cited on appeal. Defendant has failed to establish a reasonable probability that the result of the proceedings would have been different if he had possessed all of the records sought. *See United States v. Bagley.*

Defendant also argues that he requested and was denied access to a study by the IRS concerning the

valuation of ethanol plants in Louisiana and asserts that this study was material. Defendant argues that an IRS agent, David L. Buchmueller, testified that the New Mexico plants were overvalued. The issue of whether plants were overvalued is only one of several reasons why the IRS denied the right of investors in the plants to tax benefits. The IRS also based its denial of investment credit on the manner in which the purchase agreements were structured and the fact that the purchasers of the plants never assumed the risks and benefits of ownership. Thus, the record as a whole supports the trial court's determination that there is no reasonable probability that further evidence on the question of valuation of the plants would have changed the outcome of the trial. *United States v. Bagley.*

Finally, defendant points to his failure to receive an internal IRS memorandum concerning Agent Buchmueller's recommendation of civil action against defendant and others in connection with the construction and sale of the New Mexico ethanol plants. He claims this memorandum contains various statements that conflict with Buchmueller's testimony at trial and reference to a tax court decision concerning the availability of an investment tax credit for a property that could not be used because it did not have a power source.

Defendant was accused and convicted of defrauding the purchasers of the plants in question, not the federal government. The investment tax credit was only one of the tax benefits available to purchasers of the ethanol plants. Moreover, the decision of the IRS to disallow these tax benefits to the purchasers of these plants was based on a number of factors, including the fact that the purchasers did not, under the agreements involved,

actually assume the risks and benefits of ownership of the plants. Thus, defendant has failed to establish that he timely sought discovery of the records in question and that their earlier availability to defendant would reasonably have affected the outcome of the trial. We affirm the trial court's ruling that there was no reasonable probability that possession of this document would have changed the outcome of the proceeding.

III. EVIDENTIARY ISSUES

Defendant argues the trial court denied him due process by erroneously admitting certain evidence. We address in tandem defendant's claims of error regarding the admission of evidence and allegations that the state knowingly used false evidence.

(A) Defendant contends that the trial court erred in allowing IRS Agent Buchmueller to illustrate the tax benefits available to a person purchasing an ethanol plant by testifying to the tax benefits that would have been received by a hypothetical taxpayer who had paid specific amounts of taxes in 1979, 1980, and 1981, and who had certain income in 1982. Buchmueller testified that he was the head of the IRS division that reviewed tax benefits claimed by taxpayers.

The record fails to indicate, and defendant's brief-in-chief does not assert, that defendant ever objected to Buchmueller testifying as a tax expert. Defendant's objections, instead, were directed to the state's failure to produce all of the tax returns of investors in the plants and the witnesses testimony concerning hypothetical situations. In arguing his objection defendant stated in part:

> I understand that the law is one may ask hypothetical questions of expert witnesses, but I didn't know the law allows that one expert can testify with [hypotheticals] with regard to what the true facts are. If hypotheticals are permitted to replace that and for those reasons the defense . . . objects.

The trial court overruled defendant's objection and noted "it's the court's view that an expert can testify using hypothetical facts to illustate his . . . testimony." Based on the grounds stated by defendant's objection we find no error in the ruling. *See* SCRA 1986, 13-209. Permitting a hypothetical question to be posed to an expert witness is within the discretion of the trial court under SCRA 1986, 11-705. *See State v. Johnson*, 99 N.M. 682, 662 P.2d 1349 (1983). Defendant's brief-in-chief does not indicate that he interposed other objections to the witnesses testimony. The record indicates that at the motion for new trial defense counsel stated: "I don't know that I made the objection at the time but I would note at this time that in addition to everything else, it [the testimony] bears close resemblance to evidence of a separate crime . . . but I didn't make that objection as I recall. . . ."

We find no merit in defendant's argument concerning this issue.

(B) Next defendant argues the trial court erred in allowing Agent Buchmueller to testify concerning the amount of revenue potentially lost by the federal government as a result of tax benefits claimed by persons purchasing ethanol plants from Midwestern.

Prior to his testimony, defendant objected to any testimony by Buchmueller concerning examples of tax

benefits which might be derived by investors claiming tax benefits or credits from interests acquired in an ethanol plant. Defendant argued that he did not have access to all of the tax returns of the investors involved in the plants and that the witnesses' testimony was conjectural or predicated upon improper assumptions. The trial court overruled defendant's objection.

The specific question, answer, and objection are important on this issue. Buchmueller was asked by the state whether he had any idea of the total amount of tax benefits claimed by investors that had been disallowed by the IRS, as a ballpark figure. He answered that he could relate the amount of approximate tax benefits that flowed out of the partnerships and were available to taxpayers and that, assuming a 50% bracket taxpayer, they would have approximated close to $20.5 million. He also stated that a tax credit would be less for a 25% bracket taxpayer and that the type of tax liability of the individual would determine the amount claimed.

Defendant's objection to this testimony was not that it was not relevant. Instead, defendant objected on the grounds that Buchmueller had not reviewed the individual returns that had been filed, and therefore the witness had no basis on which to provide testimony other than a "guesstimate." In addition, defendant argued that the IRS had still not provided twenty-four of the ninety tax returns, and therefore counsel did not feel he was adequately prepared to present evidence on the issue or to effectively cross-examine the witness. The trial court denied the objection, commenting that the defense had a significant number of returns, and these would be sufficient for their purposes.

In *State v. Peke,* 70 N.M. 108, 371 P.2d 226, *cert. denied,* 371 U.S. 924 (1962), our supreme court considered a case wherein Peke had been tried and convicted of embezzlement. At trial defendant objected to the introduction of an audit of an account on the grounds that the books and records of the account were not in evidence. The trial court overruled the objection, and the supreme court affirmed. The trial court and the supreme court noted that although all the records were not before the court, nevertheless defendant had access to the records on which the audit was based. In the instant case, although defendant did not have access to all of the tax returns involved, defendant has failed to establish why the records which were available would not have sufficed and how the additional returns would have materially changed the result at trial.

(C) Defendant's third evidentiary issue is a claim that the prosecution knowingly used false evidence against him. This claim relates to state's exhibit 71, an opinion letter signed by defendant in connection with an anticipated sale of industrial revenue bonds by the City of Roswell. Defendant does not challenge the authenticity of the exhibit or his signature on it. Instead, he argues that the manner in which the prosecution used this evidence constitutes the knowing use of false evidence because the prosecutors in the case were well aware, as a result of testimony during a preliminary hearing held in Roswell more than a month before the trial in this case, that the persons to whom the letter was addressed did not rely on the representations therein.

Defendant did not, however, raise this issue at trial. At trial his objection to the letter was that it related to other criminal charges and was outside the scope of

the indictment of this case. The state, on the other hand, argued the letter was admissible on the issue of intent under SCRA 1986, 11-404(B), and the trial court ruled on that basis. The trial court's admission of this evidence was not error. Moreover, defendant later raised the false evidence claim at the hearing on his motion for new trial. This was not, however, sufficient to preserve the issue for appeal. *See Duncan v. Holder*, 15 N.M. 323, 107 P. 685 (1910); *Romero v. Melbourne*, 90 N.M. 169, 561 P.2d 31 (Ct. App. 1977).

IV. SUFFICIENCY OF THE EVIDENCE

Defendant asserts that the evidence is insufficient to support his conviction. Defendant argues, for example, there is no evidence of his knowledge of a scheme to build an additional plant using funds and equipment charged to other plants or his agreement to participate in such a plan. Review of the record herein indicates, however, that Carl Baron testified concerning defendant's knowledge of the scheme in late 1982 or early 1983. Baron also testified concerning his discussions with defendant and Ron Walker about records sent to Bonem and that this documentation indicated that materials and labor for the additional plant were shown as having gone into one of the authorized plants.

Defendant argues, among other things, that there was insufficient evidence to support his conviction for criminal solicitation and that even if the jury believed he talked to Paul Liscom, Liscom's only concern was that the plants could not produce at design capacity. In contrast to this assertion, however, the record indicates that Liscom testified that he had voiced a number of concerns about the lack of completion of the plants,

including the lack of any permanent power, the fact that plumbing was not hooked up, that one plant was not fully enclosed, and that materials needed were not on site. Liscom further testified that defendant persuaded him to sign certificates of completion for the plants although they were not in fact complete. Tom Jackson, an administrative assistant to Walker and a pilot for Midwestern, testified under a grant of immunity. Jackson testified that he flew defendant to Clovis on several occasions, that the plants were not completed, and that defendant knew they were not completed. Additionally, the record indicates that Carl Baron, a former comptroller of Midwestern, testified under immunity that false documents were prepared in connection with the plants and that defendant knew what was being done. This testimony constituted substantial evidence to uphold defendant's conviction for criminal solicitation.

In regard to the conspiracy to defraud the buyers of the plants, defendant argued the buyers did not rely on Liscom's certificate of completion. Even if this is true, the testimony of Carl Baron and Tom Jackson was sufficient to establish defendant's knowledge of the fact the plants were not complete, although they were represented to the buyers and others, including the company's outside auditors, as complete. In addition, Baron testified to defendant's knowledge of the extensive plans made and implemented to deceive the auditors so they would approve booking the revenues from the sales of the plants in 1982.

Defendant argues that the testimony and evidence of the witnesses against him were not creditable and that his version of events should have been accepted by the jury. Credibility of witnesses, however, is an

issue for the factfinder to decide. On appeal this court views the evidence in a light most favorable to support the verdict of the jury, resolving all conflicts in the evidence in its favor, and indulging in all permissible inferences in favor of the verdict. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). The jury is not required to accept defendant's testimony. *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975). A rational trier of fact could have found defendant guilty of the crimes charged beyond a reasonable doubt on the evidence presented. *See Jackson v. Virginia,* 443 U.S. 307 (1979).

V. MERGER

Defendant argues that, under NMSA 1978, Section 30-28-3(D) (Repl. Pamp. 1984), he cannot be convicted of both conspiracy and criminal solicitation. We disagree. Section 30-28-3(D) does not require dismissal of charges where the offenses have merged. Merger is an aspect of double jeopardy and is applied to prevent an individual from being punished twice for the same offense. *State v. Begay,* 105 N.M. 498, 734 P.2d 278 (Ct. App. 1987). *See State v. Shade,* 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986). In this case the sentences on these counts were both third degree felonies and were ordered to be served concurrently. Thus, there can be no multiple punishment. *See State v. Srader,* 103 N.M. 205, 704 P.2d 459 (Ct. App. 1985). We find no merit to defendant's contention on this issue.

VI. CUMULATIVE ERROR

Defendant argues that the various errors committed by the trial court, considered cumulatively, have denied him a fair trial. Since we have found no error as to

the individual claims raised on appeal, there is no cumulative error. *See State v. Shafer,* 102 N.M. 629, 698 P.2d 902 (Ct. App. 1985), relying on *State v. McGuinty,* 97 N.M. 360, 639 P.2d 1214 (Ct. App. 1982).

VII. PENDING MOTIONS

The state's motion to strike defendant's interlineated brief is denied. The motion was based on the contention that the excerpt from the Roswell preliminary hearing attached to the interlineated brief is not a part of the record on appeal. This contention is in error. The excerpt was admitted into evidence below as defendant's exhibit 20 at the hearing on the motion for new trial.

Defendant has moved for reconsideration of our previous order granting the state's motion to strike the sixty-two-page addendum to his sixty-eight-page brief-in-chief. Rule 12-213(A)(2) requires that the brief-in-chief include a summary of proceedings, which must include a statement of relevant facts. Rule 12-213(F) provides the summary of proceedings and argument may not exceed thirty-five pages without permission of the court. On July 8, 1988, Willard Bunch, counsel for defendant, sought and was granted permission to file a brief-in-chief in which the summary of proceedings and argument could include up to seventy pages. Subsequently, Mr. Bunch sought and was granted additional time so he could conform his brief to the page limitation.

This court has previously expressed its displeasure with attorneys who attempt to circumvent the rules of appellate procedure with regard to page limitations. *See Schmidt v. St. Joseph's Hosp.,* 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987). We do so again. We reconsider

the order striking the addendum and allow the addendum to be filed. However, Mr. Bunch and local counsel, Reber Boult, are cautioned against a repetition of this conduct.

CONCLUSION

We have reviewed each of defendant's claims on appeal and find them without merit. The defendant's request for oral argument is denied. Oral argument is unnecessary in this case.

Defendant's convictions are affirmed.

IT IS SO ORDERED.

/s/ Thomas A. Donnelly
Thomas A. Donnelly, Judge

WE CONCUR:

/s/ Benjamin Anthony Chavez
Benjamin Anthony Chavez, Judge

Harris L. Hartz, Judge (Specially concurring)

HARTZ, Judge (Specially concurring).

I concur in the affirmance of defendant's conviction and join in the opinion as to exhibit 71, sufficiency of the evidence, merger, and cumulative error. I write separately on the other issues because I would approach them a bit differently.

PREINDICTMENT DELAY

Arizona v. Youngblood, ... U.S. ....., 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) clarifies the standard for evaluating defendant's claim that he was denied due process because of the disappearance of certain evidence allegedly caused by preindictment delay. The defendant in *Youngblood* contended that his due process rights were violated because of the failure of the state to preserve semen samples that, if tested, could have established his innocence. The Court wrote:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady* [*v. Maryland*, 373 U.S. 83 (1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially useful* evidence does not constitute a denial of due process of law. [Emphasis added.]

Id. at ....., 109 S. Ct. at 337, 102 L. Ed. 2d at 289. The opinion in *Youngblood* compels the conclusion that in the absence of bad faith by the state, a defendant claiming a denial of due process because of the unavailability of evidence due to preindictment delay must show more than that the evidence was "potentially useful." (We need not decide if, in the absence of bad faith, the disappearance of material exculpatory evidence caused by preindictment delay would create a denial of due process.)

In this case, defendant has not claimed that the state acted in bad faith in delaying an indictment. Indeed, lengthy delays can be expected in prosecutions for fraud, because it is often a significant period of time before anyone alleges a crime and investigation of alleged fraud is generally a time consuming process. Therefore, defendant must establish that the evidence allegedly lost was more than just "potentially useful" within the meaning of *Youngblood*. As shown by the majority's opinion, defendant has not done so. Defendant's due process claim must fail.

DISCOVERY AND CONTINUANCE

With respect to defendant's contention that he should have been granted a continuance to enable his attorney to review materials received at the outset of trial, I believe it is unnecessary to evaluate whether defendant was prejudiced by the denial of the continuance. The district court found, and its finding is supported by the record, that defendant and his counsel were responsible for the delay in obtaining those materials. Defendant therefore cannot obtain relief based on any prejudice caused by the delay.

AGENT BUCHMUELLER'S TESTIMONY

The ethanol investment program was marketed as a tax shelter. The state is entitled to explain to the jury what a tax shelter is. One acceptable method to accomplish that is to explain how much in the way of tax savings was potentially available to investors in the program. Thus, Agent Buchmueller's testimony was admissible. It is irrelevant whether any particular investor took full advantage of the potential tax credits.

PENDING MOTIONS

I would not permit the filing of defendant's sixty-two-page addendum.

/s/ Harris L. Hartz
Harris L. Hartz, Judge

(Dated July 18, 1989)

IN THE
SUPREME COURT OF THE STATE
OF NEW MEXICO
Tuesday, July 18, 1989

NO. 18,504

THOMAS W. TIERNEY,
Petitioner,
vs.
STATE OF NEW MEXICO,
Respondent.

This matter coming on for consideration by the Court upon Motion for rehearing, and the Court having considered said motion and now being sufficiently advised;

NOW THEREFORE, IT IS ORDERED, that the Motion for rehearing is hereby denied.

ATTEST: A True Copy

Rose Marie Alderete
Clerk of the Supreme Court

By /s/ Jane Gurulé
Deputy

(Received March 16, 1987)

IN THE
SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR-42042

STATE OF NEW MEXICO,
Plaintiff,
vs.
THOMAS TIERNEY, CARL WRIGHT, KENNETH SINKS and PAUL LISCOM,
Defendants.

ORDER IN AID OF DISCOVERY

The defendant, Thomas Tierney, having requested that the Court enter an Order in Aid of Discovery and the Court having considered said request and the Court finding that the request should be granted to the extent hereinafter ordered.

IT IS THEREFORE ORDERED that the State, the U.S. Securities and Exchange Commission, the U.S. Treasury Department and the Internal Revenue Service produce for inspection, and to the extent desired copying, by counsel for defendant Tierney, at a time and place convenient to all concerned, the following materials and documents, to-wit:

(a) the complete text of the testimony of each individual who appeared before or was deposed or

examined under oath by any attorney, agent, investigator, accountant or member of the staff of the U.S. Securities and Exchange Commission in connection with any investigation by it of or concerning The Midwestern Companies, Inc. ("Midwestern"), any of its subsidiaries, officers, directors, agents or employees, the affairs or conduct of any of them, or trading in Midwestern stock or securities, together with any and all exhibits identified or referred to in the course of said testimony.

(b) any statements, recordings, memoranda or synopsis in non-testimonial form of conversations or interviews by members of the enforcement or other staff of the U.S. Securities and Exchange Commission of any individuals identified in subparagraph (a) above.

(c) all instruments, documents, materials and tangible items produced by each of the individuals identified in subparagraph (a) above pursuant to subpoena duces tecum or request by the U.S. Securities and Exchange Commission.

(d) any files, instruments, documents or records of Midwestern, any of its subsidiaries, State's witness Walker, any named defendant herein, any scheduled witness herein, and any other individual identified in subparagraph (a) above, within the possession or control of the U.S. Securities and Exchange Commission, and not otherwise furnished in response to subparagraphs (a) (b) or (c) above.

(e) the complete text of any testimony or deposition, and of any written, recorded or summarized statement of any of the individuals identified in sub-

paragraph (a) hereof before or to any agent, special agent, case agent, investigator or member of the staff of the U.S. Treasury Department or the Internal Revenue Service, together with any and all exhibits identified or referred to in the course of said testimony or statement.

(f) the complete text of any testimony or deposition, and of any written, recorded or summarized statement of each individual deposed, examined under oath, interviewed or questioned by any agent, special agent, case agent, investigator or member of the staff of the U.S. Treasury Department or the Internal Revenue Service in connection with any investigation, examination or inquiry (civil or criminal) concerning Midwestern, any of its subsidiaries, officers, directors, agents, employees, contractors or suppliers, any purchaser or purported purchaser of any ethanol production facility from Midwestern or any of its subsidiaries, any individual partner in any purchaser or purported purchaser of any ethanol production facility from Midwestern or any of its subsidiaries, any person or entity receiving or claiming any commission or other compensation in connection with any such sale, or any persons or entities effecting trades in Midwestern stock or securities with, for or on behalf of a Midwestern officer, director or affiliate.

(g) all instruments, documents, materials and tangible items produced by each of the individuals identified in subparagraphs (e) and (f) above pursuant to subpoena duces tecum or request by the U.S. Treasury Department or the Internal Revenue Service.

(h) any files, instruments, documents or records of Midwestern, any of its subsidiaries, State's witness Walker, any named defendant herein, any scheduled witness herein, and any other individual identified in subparagraphs (e) and (f) above, within the possession or control of the U.S. Treasury Department or Internal Revenue Service, and not otherwise furnished in response to subparagraphs (e), (f) and (g) above.

(i) any reports notes, memoranda or recordings which reflect or describe interviews of any individuals identified in subparagraphs (e) or (f) hereof by any agent, special agent, case agent, investigator or member of the staff of the U.S. Treasury Department or the Internal Revenue Service; provided this requirement shall not apply to attorney work product.

(j) any preliminary or final determination by the Internal Revenue Service with respect to the availability or allowability of credits or deductions claimed by the purchasers of Clovis plants I through IV, inclusive for taxable year 1982; together with any indications received by the Service that any such determination is being challenged by the purchasers of all or any of said plants.

(k) any preliminary or final determination by the Internal Revenue Service with respect to the question of whether Clovis plants I through IV, inclusive, met the qualifications of availability to be placed in service as prescribed by the Internal Revenue Code and Regulations in effect as at December 31, 1982; together with any indications received

by the Service that any such determination is being challenged by the purchasers of all or any of said plants.

IT IS FURTHER ORDERED that the agencies named herein cooperate to the fullest extent possible in the assembly and production of the foregoing materials and that they produce the same before trial presently set for July 7, 1987 so that effective use thereof can be made by defendant's counsel.

/s/ Stanley F. Frost
District Judge

(Dated June 20, 1988)

IN THE COURT OF APPEALS
FOR THE STATE OF
NEW MEXICO

Court of Appeals No. 10310

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

THOMAS W. TIERNEY,
Defendant-Appellant

On Appeal From The Second Judicial District, County of Bernalillo, State of New Mexico, Proceedings No. 42042 CR

MOTION TO SUPPLEMENT RECORD

COMES NOW the defendant-appellant, pursuant to Rule 12-209 C, New Mexico Rules of Appellate Procedure, and respectfully moves the Court to supplement the record proper in this appeal by adding thereto the correspondence listed and set forth at Schedule A attached hereto, and by this reference incorporated herein.

In support of its motion aforesaid, defendant-appellant advises the Court that each of the items of correspondence referred to above falls within the definition of materials to be included in the record proper, as a paper or pleading filed with the district court; but that the docket sheet filed as a part thereof does not list them amongst the items so included. Since the trial of

these proceedings was held before a trial judge from another judicial district, and each of the materials in question were addressed or copied to him at his domiciliary office address, the possibility exists that the same were inadvertantly not forwarded to the District Clerk in Bernalillo County for filing after disposition.

The significance of these materials is to further evidence the fact that there was an ongoing effort on the part the defense to secure items of discovery to which it could not gain independent access, as well as to secure the State's cooperation in affording it such access, and that these efforts were called to the attention of the trial court.

Defendant-appellant has sought independently to obtain a stipulation from the State regarding a number of telephone conferences held between defense counsel and the Office of the Attorney General to evidence its ongoing efforts to secure the State's assistance in this regard; but the State has refused to enter into such a stipulation. Since such telephone conferences were independent of those held with the trial court itself, they are not by definition a part of the record proper or the transcript of proceedings herein, and in the absence of the State's agreement to stipulate to their content or existence, defendant-appellant is without power to advance them as further evidence of his good-faith and continuing efforts to secure the cooperation of the State in his attempts to obtain full and complete discovery of materials vital to his defense. Accordingly, defendant-appellant desires to insure that all evidence of his continuing efforts in this regard which is unquestionably includable within the record proper be so included.

The materials sought to be included as a part of the record proper hereby are not duplicitous, but supplementary to those materials, pleadings, stipulations and transcripts and exhibits of motion hearings previously included, or to be included, in the record proper and transcript of proceedings herein.

WHEREFORE, the premises considered, defendant appellant respectfully requests that record proper in these proceedings be further supplemented by adding thereto the correspondence listed and set forth at Schedule A hereto.

Respectfully submitted,

/s/ Willard B. Bunch
Willard B. Bunch
2723 Commerce Tower
911 Main Street
Kansas City, MO 64105
(816) 421-4334
Attorney for Appellant

(Certificate of Service omitted in printing)

SCHEDULE A TO DEFENDANT-APPELLANT'S MOTION TO SUPPLEMENT RECORD

1. Specific request for discovery materials forwarded to the State and copied to the trial court on December 11, 1986.

2. Letter of January 20, forwarding initial draft or proposed Order in Aid of Discovery requested by the trial court on failure of the State to comply with defendant-appellant's earlier discovery requests.

3. Letter of March 5, 1987, forwarding amended form of proposed Order in Aid of Discovery advanced by defendant-appellant following intervening telephone conferences among the trial court, prosecution and defense counsel.

4. Letter of March 25, 1987, complaining of the State's failure, over the period of two intervening weeks, to comply with the trial court's Order in Aid of Discovery entered on March 11.

5. Letter of March 31, 1987, from Assistant Attorney General Pearlman, disclaiming any responsibility on the part of the State to furnish defendant-appellant with any materials other than those in its file, or to attempt to assure compliance with the trial court's Order in Aid or Discovery of March 11, 1987, by the federal agencies to whose records he had admitted access.

6. Letter of May 11, 1987, from defense counsel to the trial court, complaining of lack of compliance by the federal agencies, and seeking the court's assistance.

7. Letter of May 13, 1987, from defense counsel to the trial court, enclosing proposed order to show cause

for failure to comply with its Order in Aid of Discovery, and complaining of the inability to contact attorneys for the prosecution in connection therewith.

8. Letter of June 1, 1987, from defense counsel to the trial court, reporting on the status of discovery proceedings since the court's intervention at a telephone conference requested by the defense during the week of May 18.

9. Letter of June 9, 1987, from defense counsel to the trial court, containing a report of serious deficiencies still existent in compliance by the State and federal agencies with the court's Order in Aid of Discovery, and the effect thereof upon defendant's pending motion for show cause.

10. Letter of June 10, 1987, from defense counsel to the trial court accompanying his request for a continuance of the trial date by reason of failure of discovery, and the inability of counsel to effectively review the vast quantity of materials yet to be produced by reason of the unexpected necessity that he proceed to trial of a complex federal proceeding which would completely occupy him until the date trial herein, even if the requested materials were later produced.

(Filed July 1, 1988)

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 10,310

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

THOMAS W. TIERNEY,
Defendant-Appellant.

ORDER

* * *

This matter also came before the court upon defendant's motion to supplement the record on appeal with various correspondences attached to the motion. It appearing to the court that the correspondences with which defendant seeks to supplement the record on appeal were not filed in the district court file; it further appearing that rule 12-209(A) defines the record proper as the papers and pleadings filed in the district court file; it also appearing that SCRA 1986, 12-209(C) allows modification of the record on appeal with materials that were actually filed in the district court file but due to error or accident were not made a part of the record on appeal,

IT IS THEREFORE ORDERED that defendant's motion is denied.

* * *

IT IS FURTHER ORDERED that all other relief requested by defendant in the motion is denied.

/s/ Thomas A. Donnelly
Chief Judge

(Filed January 5, 1989)

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 10,310

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

THOMAS W. TIERNEY,
Defendant-Appellant.

ORDER

This matter came before the court on the motion of defendant, Thomas W. Tierney, for limited remand to the district court for hearing and determination of defendant-appellant's motion for new trial on the basis of newly discovered evidence, and for stay of appellate proceedings pending such determination, filed December 12, 1988, and on the supplement to the motion, filed December 19, 1988. Appellee, the attorney general's office, filed a response in opposition to appellant's motion for stay of appellate proceedings on December 14, 1988. Appellant filed a reply to appellee's response on December 21, 1988.

The court has considered the briefs and arguments on the parties on these issues. The motion of defendant, both in its original form and as supplemented later, is DENIED.

/s/ Pamela B. Minznir
Judge
/s/ Thomas A. Donnelly
Judge
/s/ A. Joseph Alarid
Judge

(Dated January 20, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1111WM.

United States of America,
Appellee,

vs.

Thomas Tierney,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

---

On the Court's own motion, this case is dismissed without prejudice and remanded to the district court to rule on petitioner's motion for a new trial based upon alleged newly discovered evidence.

January 20, 1989

NEW MEXICO CONSTITUTION

* * *

Art. VI, § 2 [Supreme court; appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965.)

* * *

Art. VI, § 3 [Supreme court; original jurisdiction; supervisory control; extraordinary writs.]

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

* * *

NMSA 1978, AS AMENDED

§ 30-16-6. Fraud.

Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations.

* * *

Whoever commits fraud when the value of the property misappropriated or taken is over one hundred dollars ($100) but not more than twenty-five hundred dollars ($2,500) is guilty of a fourth degree felony.

* * *

§ 30-28-2. Conspiracy.

A. Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.

B. Whoever commits conspiracy shall be punished as follows:

* * *

(3) if the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

* * *

§ 30-28-3. Criminal solicitation; penalty.

A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands,

requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

B. In any prosecution for criminal solicitation, it is an affirmative defense that under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant:

(1) notified the person solicited; and

(2) gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.

The burden of raising this issue is on the defendant, but does not shift the burden of proof of the state to prove all of the elements of the crime of solicitation beyond a reasonable doubt.

C. It is not a defense that the person solicited could not be guilty of the offense solicited due to insanity, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics.

D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of crim-

inal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited.

* * *

§ 30-42-3. Definitions.

As used in the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978]:

A. "racketeering" means any act which is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

* * *

(6) fraud, as provided in Section 30-16-6 NMSA 1978;

* * *

(16) criminal solicitation, as provided in Section 30-28-3 NMSA 1978;

* * *

B. "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

C. "enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and

D. "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the

intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of such incidents occurred after the effective date of the Racketeering Act and the last of which occurred within five years after the commission of a prior incident of racketeering.

* * *

§ 30-42-4. Prohibited activities; penalties.

* * *

C. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs by engaging in a pattern of racketeering activity. Whoever violates this subsection is guilty of a second degree felony.

* * *

SCRA 1986

§ 12-209. The record proper (the court file).

A. **Composition.** The papers and pleadings filed in the district court (the court file), or a copy thereof shall constitute the record proper. Depositions shall not be copied. The original, if contained in the court file, shall be filed with the appellate court. The record proper shall be prepared in the manner provided by Rule 22-301 of the Rules Governing the Recording of Judicial Proceedings.

* * *

C. **Correction or modification of the record proper.** If anything material to either party is omitted from the record proper by error or accident, the parties by stip-

ulation, or the district court or the appellate court on motion or on its own initiative, may direct that the omission be corrected, and a supplemental record proper transmitted to the appellate court.

* * *

(Dated April 12, 1989)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 88-00007-01-CR-W-6

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THOMAS W. TIERNEY,
Defendant.

AFFIDAVIT OF DANIEL J. PEARLMAN

The undersigned affiant, Daniel J. Pearlman, being duly sworn upon his oath, states the following:

1. I am an Assistant Attorney General for the State of New Mexico, assigned to the Special Prosecutions Division. I am, and have been throughout this matter, lead counsel in this office's criminal investigation and prosecution of cases involving the activities of the Midwestern Companies, including *State v. Thomas Tierney*, Bernalillo County Cause No. 42042CR (on change of venue from the original Curry County indictment).

* * *

5. No materials obtained by my office from Federal agency files were excluded from the State's open file for discovery. The materials copied by the IRS and SEC for our files were requested on the basis of subject matter

and witness names which we believed were likely to be relevant to our prosecution. We did not request or review other materials in those federal agency files.

* * *

/s/ Daniel J. Pearlman
Daniel J. Pearlman
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 12 day of April, 1989.

/s/ (Illegible)
Notary Public

My Commission Expires: 11-10-89

(Dated April 20, 1989)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 87-00007-01-CR-W-6

UNITED STATES OF AMERICA,
Plaintiff,

v.

THOMAS W. TIERNEY,
Defendant.

AFFIDAVIT OF RUDOLPH GERLICH, JR. IN SUPPORT OF SUPPLEMENTAL ANSWER TO DEFENDANT THOMAS W. TIERNEY'S MOTION FOR NEW TRIAL

The undersigned affiant, Rudolph Gerlich, Jr., being duly sworn upon his oath, states the following:

1. I am an attorney at law, admitted to the Bar of the District of Columbia and am employed in the headquarters office of the Securities and Exchange Commission ("Commission"), Washington, D.C., as a Branch Chief in its Division of Enforcement.

* * *

5. In or about January 1985, pursuant to the usual Commission procedures, access to the Commission's files in the Midwestern investigation was granted to the Office of the Attorney General of the State of New Mexico at their request.

6. In or about July 1985, pursuant to the usual Commission procedures, access to the Commission's files in Midwestern investigation was granted to the U.S. Attorney for the Western District of Missouri at his request.

7. Pursuant to the grants of access referred to in Paragraphs 5 and 6, above, the prosecutorial authorities were given open access to the Commission's files except for certain privileged portions and were allowed to select documents as they saw fit.

8. Representatives of the Office of Attorney General of the State of New Mexico and the U.S. Attorney for the Western District of New Mexico were allowed to review the Commission's investigative files in the Midwestern matter as they deemed appropriate. At no time did I have discussions with representatives of either office regarding excluding documents from their review. From time to time, various items in the Commission's investigative files, including transcripts of testimony and miscellaneous documents, were transmitted to the above-referenced offices at their request. I do not know what specific documents representatives from those offices chose to review nor do I have a comprehensive understanding as to which documents were selected for transmittal.

* * *

/s/ Rudolph Gerlich, Jr.
Rudolph Gerlich, Jr.

SUBSCRIBED AND SWORN to before me on this 20th day of April, 1989.

/s/ (Illegible)
Notary Public

My Commission Expires: May 31, 1993

(Dated February 10, 1987)

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Benjamin F. Mann, having first been duly sworn, state upon my oath as follows:

* * *

2. I am a duly licensed attorney and a partner in the firm of Blackwell Sanders Matheny Weary & Lombardi ("Blackwell Sanders"), which consists of 72 attorneys in Kansas City, Missouri and Overland Park, Kansas. Blackwell Sanders, as of January 31, 1987 was handling more than 3,000 separate matters for more than 1,000 separate clients.

* * *

9. I am the partner in charge of the Midwestern litigation matters in the Blackwell Sanders offices. I am responsible for the day to day management of these matters and the supervision of all personnel working in these matters.

* * *

14. In the Spring of 1985, NUFI, through Blackwell Sanders, obtained, at NUFI's cost, a copy of all (or, at least, what was represented to be all) Midwestern's corporate and business records. The records were provided by Midwestern (then a debtor in possession in a Chapter 11 bankruptcy reorganization proceeding) pursuant to an agreement to maintain such records in a document depository and to make them available to all parties and counsel in the various Midwestern litigation matters. In

the fall of 1986, Steven Block, trustee in bankruptcy for Midwestern (Midwestern's Chapter 11 was converted to a Chapter 7 liquidation proceeding), contacted me by telephone and advised me that a representative of the New Mexico Attorney General's Office would be contacting me and requesting access to the Midwestern Document Depository. Block requested that I provide access, and I agreed to do so. * * *

15. I met with representatives from the New Mexico Attorney General's office, at their request, in the fall of 1986 and provided them access to the Depository and to copies of pleadings and deposition transcripts in the Midwestern litigation matters. They requested copies of certain documents selected by them. We provided copies of same billed them for the costs of copying same, just as we have other counsel in the Midwestern litigation.

16. In the fall of 1986, Blackwell Sanders provided Cynthia Clark Campbell, at her request, access to the Depository and to copies of pleadings and deposition transcripts in the Midwestern litigation matters. * * *

* * *

/s/ Benjamin F. Mann
Benjamin F. Mann

Subscribed and sworn to before me this 10th day of February, 1987.

/s/ Linda J. Benso
Notary Public

My Commission Expires: April 30, 1987

BUNCH & SKEENS, P.C.
Willard B. Bunch
Milton Skeens
Associate:
John Edward Cash

4515 Madison
Kansas City, Missouri 64111
(816) 561-2720
(816) 561-2971

December 11, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Daniel Pearlman, Esq.
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Re: State v. Walker, et al, Proceedings No. CR-42042 Before the Second Judicial District Court of the State of New Mexico

Dear Mr. Pearlman:

We were quite surprised by your assertion during oral argument of defendant Tierney's Motion to Dismiss Indictment in the captioned proceedings on December 8, 1986, that you had not deemed it appropriate or necessary to disclose the contents of some tens of thousands of pages of SEC testimony to the grand jury in said proceedings. If the state or any investigator for the state has reviewed tens of thousands of pages of testimony before the SEC, they certainly have not been made available to us, nor are they contained within the state's file exhibited to me in Santa Fe.

* * *

This absence of materials from your files, particularly a wealth of materials which we can establish were previously furnished, leads us to believe that there may well be a substantive amount of evidentiary material which is either exculpatory as to Mr. Tierney or otherwise material to his defense which is being suppressed, or otherwise being held unavailable for our inspection.

* * *

As a prosecuting attorney, you have a duty under New Mexico law both to conduct yourself in a fair and impartial manner, *State v. Velasquez*, 99 N.M. 692, 654 P.2d 562 (Ct. App. 1982), and to protect both the public's interests and the rights of the accused, *State v. Cruz*, 99 N.M. 690, 662 P.2d 1357 (1983), *State v. Hill*, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975). If you have failed in this duty by systematically excluding, or permitting others to exclude, material information which may be favorable to Mr. Tierney from the only source of discovery open to him, i.e., your "open" file, we have a right to cause you to draw these materials in, and to examine them. * * *

In light of the foregoing, and in conformity with *United States v. Agurs*, 427 U.S. 97 (1976), we make the following additional specific discovery requests of you, in order to protect the rights of Mr. Tierney. * * * We would request that you respond to these discovery requests immediately and in writing, so we can more properly focus the discovery in this case. See *Agurs*, 427 U.S. at 106.

These discovery requests, of course, are made under the authority of *Brady v. Maryland*, 373 U.S. 83 (1963), which makes the discovery of exculpatory material a

matter of due process of law. The *Brady* doctrine extends to the discovery of impeachment material of potential government witnesses. See *United States v. Bagley*, ... U.S. ....., 105 S. Ct. 3375 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Scurr v. Niccum*, 620 F.2d 973, 979 (8th Cir. 1980). We believe that should you not comply with these discovery requests in a timely fashion, Mr. Tierney will be denied the effective assistance of counsel as guaranteed to him under the fifth, sixth, and fourteenth amendments to the United States Constitution.

Specific Requests

* * *

4. We request a list of all law enforcement or governmental agency personnel, whether federal, state, county or municipal, who were involved, or who furnished information or materials to those involved, in the investigation of this case.

* * *

6. We request that you produce all rough notes of any agents, investigators or law enforcement personnel, whether federal, state, county, or municipal, either used, reviewed or known to exist but excluded (by you or by others) from your review in the investigation of this case, whether or not the same are currently in your possession or files. See *United States v. Walden*, 590 F.2d 85, 86 (3d Cir. 1978); *United States v. Crowell*, 586 F.2d 1020, 1028 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979).

7. Please produce any notes or documents prepared by members of the staff of the Attorney General of New Mexico, the District Attorney of Curry County,

New Mexico, the U.S. Department of Justice, the U.S. Treasury Department, the Internal Revenue Service, the U.S. Securities and Exchange Commission, or any United States Attorney, or any agent or investigator of any of them which have been used, reviewed or are known to exist but were excluded (by you or by others) from your review in the investigation of this case, whether or not the same are currently in your possession or files. See generally *Goldberg v. United States,* 425 U.S. 94 (1976).

8. Please produce any and all statements of all persons who have been interviewed by an agent or investigator or a member of the staff of the New Mexico Attorney General's Office, the Curry County District Attorney's Office, the U.S. Department of Justice, the U.S. Treasury Department, the Internal Revenue Service, the U.S. Securities and Exchange Commission, any United States Attorney or any other governmental agency in connection with the subject matter of this case and which have been used, reviewed or are known to exist but were excluded (by you or by others) from your review in the investigation of this case, whether or not the State intends to call any such person(s) to testify at trial, and whether or not such statement (a) if in writing, has been signed or approved by the witness, (b) relates to the proposed subject matter of the testimony of a witness to be called at trial, (c) is merely a summary of the facts related to the interviewer, or (d) is currently in your possession or file.

9. Please produce any and all stenographic recordings or transcriptions of any oral statement or deposition made by any person to any agent or investigator

or a member of the staff of the New Mexico Attorney General's Office, the Curry County District Attorney's Office, the U.S. Department of Justice, the U.S. Treasury Department, the Internal Revenue Service, the U.S. Securities and Exchange Commission, any United States Attorney or any agent, investigator or member of the staff of any other governmental agency used, reviewed or which are known to exist but were excluded (by you or by others) from your review in connection with the investigation of the subject matter of this case, whether or not currently in your possession or file, and whether or not (a) the stenographic recordings or transcriptions are substantially verbatim recitals of such statement or testimony, (b) the statement was recorded contemporaneously with its making, or (c) the statement relates to the proposed subject matter of the testimony of a witness to be used at trial.

10. Please produce any and all other statements, whether written, oral or taped, and either within your control or known to exist and accessable by the state, of any individual the state intends to call as a witness.

* * *

12. Please produce any federal, state, county or municipal law enforcement agency reports or notes which reflect or describe interviews had with defendant Tierney and all other defendants in these proceedings, and which have been used, reviewed or are known to exist but were excluded (by you or by others) from your review in the investigation of this case, which are either within your control or are known to exist and are accessable by the state.

13. Please produce any and all statements, whether written or oral, or notes or tapes of statements which defendant Tierney or any other defendant in these proceedings made to any federal, state, county or municipal law enforcement personnel or any other individual in connection with this case and which have been used, reviewed or are known to exist but were excluded (by you or by others) from your review in the investigation of this case, which are either within your control or are known to exist and are accessable by the state.

* * *

16. Please provide a list of any expert witnesses you intend to call at the trial of this matter. * * *

* * *

18. Please produce the names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

* * *

20. Please produce all information of an exculpatory nature, including but not limited to any and all evidence favorable to Mr. Tierney and which is material to either his guilt or punishment, together with any and all evidence going to the credibility of any individual which the state intends to call as a witness, which is either presently existing or which has been destroyed, and which has been used, reviewed or is known to exist but was excluded (by you or by others) from your review in the investigation of this case, whether or not the same is presently in your file, including specifically with respect to the latter, any such materials or evidence in the files of any source identified in request number 9

above. *Hilliard v. Spalding,* 719 F.2d 1443 (9th Cir. 1983). * * *

21. Please produce this information in sufficient time before trial so that effective use can be made of this information. *United States v. Olson,* 697 F.2d 273 (8th Cir. 1973).

At considerable expense to Mr. Tierney, and after having delayed the same at your request, I have already made one trip to Santa Fe some two months ago to review your "open" file, only to be advised that it was not yet complete, organized, indexed or all available at your offices. * * * I have since made formal demand for copies of these exhibits upon you, and in view of the fact that you have not responded and I have been forced to obtain copies elsewhere for our motion practice, I can only assume that your files are still not complete.

I expect to receive the constitutionally afforded access to all of the information and materials outlined above, as well as that set forth in our earlier motions; and your continued failure to produce the same is resulting in a denial of effective assistance of counsel to Mr. Tierney, in violation of the fifth, sixth and fourteenth amendments to the United States Constitution. It serves no purpose for you to continually remonstrate over the open availability of your file when you continuously, and admittedly, hold your file in an incomplete basis. * * *

* * *

Very truly yours,

/s/ Willard B. Bunch

cc: Hon. Stanley F. Frost
All counsel of record

ATTORNEY GENERAL OF NEW MEXICO

Paul Bardacke
Attorney General

Kay Marr
Stephen Westheimer
Deputy Attorneys General

P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6000

December 19, 1986

Willard Bunch, Esq.
Bunch & Skeens, P.C.
4515 Madison
Kansas City, Missouri 64111

Re: *State v. Thomas Tierney et al.*, No. 42042 CR

Dear Mr. Bunch:

* * *

The thrust of your letter seems to be that you think New Mexico prosecutors or investigators have reviewed and relied on voluminous testimony and materials in the possession of the SEC and other Federal agencies. That is not the case. The only federally-generated materials reviewed or relied on in connection with the New Mexico investigation and prosecutions are those contained in our files, which have been and remain open to you, as to all materials other than attorney work product. We have not reviewed or read the additional voluminous testimony or exhibits which apparently exist at the SEC or other Federal agencies. * * *

* * *

Sincerely,

/s/ Daniel J. Pearlman
Daniel J. Pearlman
Assistant Attorney General

DJP:mjs

cc: Honorable Stanley F. Frost
All counsel of record

ATTORNEY GENERAL OF NEW MEXICO

Paul Bardacke
Attorney General

Kay Marr
Stephen Westheimer
Deputy Attorneys General

P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6000

December 30, 1986

Willard Bunch, Esq.
Bunch & Skeens, P.C.
Kansas City, Missouri 64111

Re: State of New Mexico v. Tierney et al., No. 42042CR

Dear Mr. Bunch:

* * *

Mr. Dickens has requested phone records for December 1982 and early 1983 from the phone companies in New Mexico and Missouri. He has been informed by both companies that records are no longer available for that time period. We have obtained a phone bill for December 1982 and January 1983 for one originating number in Clovis, which was found in the Midwestern Company files which are in the possession of Blackwell, Sanders, Matheny, Weary & Lombardi in Kansas City, a law firm which represents an insurance company in private litigation involving Midwestern's activities. I am enclosing a copy of that phone bill for your convenience. * * *

* * *

Sincerely,

/s/ Daniel J. Pearlman
Daniel J. Pearlman
Assistant Attorney General

Encl.

cc: defense counsel (w/ encl.) and Judge Frost (w/o encl.)

89-463

Supreme Court, U.S.
FILED
SEP 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

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In the Supreme Court of the United States

October Term, 1989

THOMAS W. TIERNEY

Petitioner,

vs.

STATE OF NEW MEXICO

Respondent.

SUPPLEMENTAL BRIEF PURSUANT TO SUPREME COURT RULE 22.6

WILLARD B. BUNCH, ESQ.
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ATTORNEY FOR PETITIONER

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SUPPLEMENTARY BRIEF

Pursuant to Supreme Court Rule 22.6, Petitioner files this supplementary brief to advise the Court that on September 27, 1989, the Supreme Court of New Mexico denied Petitioner's petition for a writ of superintending control therein, the effect of which, had the same been granted, would have been to require the Court of Appeals of the State of New Mexico to vacate and withdraw its memorandum opinion of April 11, 1989, and remand these proceedings to the New Mexico trial court for disposition of Petitioner's motion for new trial on the basis of newly discovered evidence of false testimony at trial by four (4) material State's witnesses.

The pendency of said petition before the New Mexico Supreme Court, together with advice that the petition for writ of certiorari herein would be withdrawn had

the New Mexico Supreme Court ruled in Petitioner's favor thereon, is referred to at page 20 of Petitioner's petition herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that three (3) counterparts of the above and foregoing Supplementary Brief were served upon Daniel J. Pearlman, Esq., Assistant Attorney General for the State of New Mexico, by mailing the same to him at his office address at P.O. Drawer 1508, Bataan Memorial Building, Santa Fe, NM 87504, this 28th day of September, 1989.

WILLARD B. BUNCH, ESQ.

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THOMAS W. TIERNEY

Petitioner,

vs.

STATE OF NEW MEXICO

Respondent.

SECOND SUPPLEMENTAL BRIEF PURSUANT TO SUPREME COURT RULE 22.6

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SECOND SUPPLEMENTAL BRIEF

Petitioner files this Second Supplemental Brief pursuant to Supreme Court Rule 22.6 to advise the Court that prosecution witness Thomas C. Jackson, in oral civil depositions commenced during the month of October, 1989, has admitted that he did not fly petitioner to Clovis, New Mexico on three (or any) separate occasions during the last half of December, 1982 as he testified at trial; nor was he present at the plant construction sites with petitioner at any time during that period.

Thus, the particularly damaging testimony which he gave at trial concerning petitioner's knowledge of the status of completion of the plants and of the conditions existent at the construction site, as evidenced by the excerpt from his trial testimony set forth in the Appendix hereto, was totally false.

Said witness has likewise belatedly

produced heretofore undisclosed personal diaries evidencing his daily activities during said period, which his testimony indicates were made known to the prosecution, but were not taken into possession for their "open" discovery file, nor produced pursuant to petitioner's Brady requests or in response to the court's order in aid of discovery of March 12, 1987.

Each of the foregoing facts support petitioner's position that he is entitled to both trial and appellate consideration, if necessary, of his motion for new trial before forfeiture of his freedom on bail. Said facts have been reported to the prosecution, which has taken no action with respect thereto.

Respectfully submitted,

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APPENDIX

Excerpt from Direct Examination of
Thomas C. Jackson during Trial

Q. I'd like to call your attention to the last entry that's made on what appears to be No. 15 or Line 15 of State's Exhibit 22 in evidence. Are you able to read that particular entry?

A. Yes, sir. Line 15 has two entries on it.

Note: State's Exhibit 22, referred to herein was the one page flight maintenance log purportedly evidencing all flights made by Mr. Jackson's Cessna 310 aircraft during the months of November and December, 1982. With respect thereto, Mr. Jackson made the following unequivocal statement on cross examination at trial: "I am not sure about the trip that took the 310 to be painted. I have indicated here a name of Burnley, who was Randall W. Burnley, who was also an approved pilot on my insurance policy for this airplane, and it went to Tulsa and Oklahoma City. I think that would be the only exception, sir, and I am not quite sure that I wasn't there also. My indication says it was with Burnley, and yet the pilot category lists Burnley as the pilot. Without exception I would say, sir, that I was on board each of these other trips on this page."

Q. We're talking about the bottom entry.

A. The bottom entry says that between the 16th day and the 31st day of December, 1982, we made three round trips in the 310 from Joplin to Kansas City Downtown Airport, to Clovis, to Phoenix, to Kansas CityDowntown Airport, and back to Joplin, for a total of 19 hours flight time.

Q. Is there any indication on your flight log as to who was present on those three trips between the 16th and 31st of December, 1982?

A. Yes, sir. Mr. Walker and Mr. Tierney.

Q. Could you tell the jury, what were you and Mr. Walker and Mr. Tierney doing in Clovis? Why were you in Clovis, if you know, in the last two weeks of December, 1982?

A. These were routine trips for which I provided air transportation for anybody that was going from the Midwestern Companies for purposes of reviewing the status of construction in Clovis.

Q. Mr. Jackson, is it fair to say that in the fall or early winter of 1982, the Midwestern Companies was constructing ethanol plants in Clovis?

A. Yes, sir.

Q. Is it fair to say, sir, that you observed the construction process from the top, through your trips to Clovis, from the time the plants began through the middle of December?

A. Yes, sir.

Q. What can you tell the jury about the condition of the plants that you saw in the middle to the end of

December, in Clovis, in 1982?

A. The several facilities had been begun. None of them had been completed, and because they had been begun in sequence, like No. 1, and 2, and 3, and 4, and so forth, they were in varying degrees of completion, construction completion.

Q. In these three trips that you took to Clovis between December 16th and 31st, did you ever have occasion to go to a construction site with the Defendant, Tom Tierney?

A. Yes, sir.

Q. Could you tell the jury what the conditions were like, the weather conditions and the construction conditions, at the construction site in late December, 1982?

A. Well, the flying weather was horrendously bad at that particular time, and Clovis had -- was ex

periencing, so it was reported, one of its worst winters in a long time.

Q. Was it just cold?

A. No, sir. It was wet. The ground was unstable. The roads were wet. The site itself was extremely muddy. When I stepped out of the car, I went up to my knees in mud.

Q. Well, was that a problem for the construction crews?

A. Yes, sir, the vehicles could hardly move, and these were large-tired vehicles.

Q. Are you talking about bulldozer type vehicles?

A. Well, I think you call them front-end loaders, but they had big tires.

Q. Based upon your observation of these plants in the middle to late December, at the time that you were

looking at them, did you reach any conclusion from your observation as to whether or not those plants could be completed by the end of December, 1982?

A. Yes, sir. They could not be completed.

Q. You're not a person who is experienced in construction?

A. That's true.

Q. But you're giving us an opinion as a lay person?

A. Yes, sir. Parts were lying all over the property.

Q. Now, in your opinion, how much time did you spend at the construction site in the last two weeks of December, 1982 with the Defendant, Tom Tierney, if you recall?

A. We would be on the ground for whatever was the business at hand. We were probably there a couple of

hours at a time.

Q. You had seen the progress from the beginning of the construction of the plants up until about December 15. Was there anything about the progress that you saw from the beginning of construction to December 15th that led you to conclude that it would be possible for the plants to move from where they were approximately December 15th to completion at the end of December, 1982?

A. Not from my point of view, no.

Q. Was the completion of these four Clovis ethanol plants by December 31, 1982, was that important to the Midwestern Companies at that time?

A. I believe so.

Q. I think we've all seen these movies where the people were covered in mud or oil when an oil well comes in, and they all seem to be smiling

while they're watching till the oil well gets capped. Is that what the situation was in Clovis in the last two weeks while people were standing in the mud watching these plants being completed? Was there elation on everybody's face from the Midwestern Companies, while these plants that were going to be so profitable for them were being constructed or finished? What was the mood?

A. That everything was behind schedule. That the weather conditions and the flow of material was slow or not there. Concern.